

United States

5

Circuit Court of Appeals

For the Ninth Circuit.

SCHENK & McDONALD, a Co-partnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the
District of Alaska, Division No. 1.

FILED
AUG 19 1918
F. D. MUNGITON,
CLERK

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posed of EDWARD SCHENK and GOR-
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff and Defendant in Error,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD, and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Defendants and Plaintiffs in Error.

Names and Addresses of Attorneys of Record.

JOHN RUSTGARD, Esq., Juneau, Alaska, Attor-
ney for Plaintiffs in Error.

HELLENTHAL & HELLENTHAL, Juneau,
Alaska, Attorneys for Defendant in Error.

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD, and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Defendants.

Complaint.

Comes now the plaintiff and complaining of the defendants, for cause of action alleges:

I.

That the plaintiff is a corporation duly organized and existing, authorized to do, and doing business in the Territory of Alaska; that it has paid its annual license fee last due to the Territory of Alaska and has fully complied with the laws of the Territory of Alaska in regard to corporations.

II.

That the defendants are indebted to the plaintiff upon an open account which has run since October, 1916, to date, on which account the plaintiff has advanced money and merchandise to the defendants in the sum of \$17,308 for which sum the defendants agreed to furnish logs or repay [1*] the plaintiff in cash, and on which account the defendants have paid the plaintiff the sum of \$15,407.97, all of which payments, except \$74.42 made in the fall of 1916, were made in the year 1917.

III.

That there is now due the plaintiff from the defendants the sum of \$1,900.03, which sum is wholly unpaid.

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of \$1,900.03, together with its costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

*Page-number appearing at foot of page of original certified Transcript of Record.

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn, on oath deposes and says: That he is an officer in charge of the plaintiff and as such has personal knowledge in regard to the facts set forth in the complaint; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes.

H. S. WORTHEN.

Subscribed and sworn to before me this 6th day of September, 1917.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires November 30, 1917.

Filed in the District Court, District of Alaska,
First Division. Sep. 6, 1917. J. W. Bell, Clerk.
By John T. Reed, Deputy. [2]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD, and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Defendants.

Answer.

Come now the defendants above named and answering the plaintiff's complaint herein show to this Court:

I.

As to the allegations set out in Paragraph I of plaintiff's complaint defendants do not have knowledge sufficient to form a belief and therefore deny all of said allegations.

II.

Defendants deny that they or that either of them is indebted to the plaintiff upon an open account or upon any other account either for money or merchandise in the sum of \$17,308 or in any other sum whatsoever.

III.

Defendants deny that there is now due plaintiff from defendants the sum of \$1,900.03 or any sum whatsoever.

IV.

For a further, separate and affirmative defense defendants allege that they have paid to plaintiff upon the said alleged account referred to in said complaint a sum in excess of [3] \$1,517.16, which is in excess of anything of value they have received from plaintiff and plaintiff is now indebted to defendants on said account.

For their first counterclaim against plaintiff, defendants allege:

I.

That between the 1st day of May and the 15th day

of September, 1916, defendants sold and delivered to plaintiff 1,406,190 feet board measure of sawlogs, for which plaintiff agreed to pay defendants at the rate of \$6.00 per 1,000 feet board measure, being the total sum of \$8,436.94.

II.

That no part of said sum has been paid except the sum of \$7,739.74, and that there has been and is due and owing defendants from plaintiff by virtue of said fact since September 15, 1916, the sum of \$697.20, together with interest thereon from said last named date.

For a second counterclaim against plaintiff, defendants allege:

I.

That on and between June 24, 1916, and the 16th day of September, 1916, defendants furnished to plaintiff at the latter's instance and request the use of a towboat with crew for periods aggregating 172 hours.

II.

That the same was actually and reasonably worth the sum of \$5 per hour, totalling \$860.

III.

That no part thereof has been paid, but that the whole thereof with interest since September 16, 1916, is now due and owing defendants. [4]

For a further and third counterclaim against plaintiff, defendants allege:

I.

That on and between March 3, 1917, and August 14, 1917, defendants sold and delivered to plaintiff

2,680,080 feet board measure of sawlogs, for which plaintiff contracted and agreed to pay defendants at the rate of \$6.50 per 1,000, amounting in all to \$17,015.46.

II.

That no part thereof has been paid except the sum of \$16,056, and that there is due and owing thereon the sum of \$757.46, with interest thereon since the 14th day of August, 1917.

For a further and fourth counterclaim against plaintiff, defendants allege:

I.

That during the month of July and August, 1917, defendants loaned to plaintiff 72 boom chains and 3 piling chains, which plaintiff agreed either to return to defendants or pay for at their value.

II.

That plaintiff has neglected and refused to return the said chains and that the actual and reasonable value of said boom chains is \$3 for each or the total of \$216, and the value of the said piling chains is \$7.50 for each or the total of \$22.50.

III.

That no part of the sum has ever been paid and though there is due and owing defendants from plaintiff by reason of said facts the sum of \$238.50.

[5]

For a further and fifth counterclaim against plaintiff, defendants allege:

I.

That on the 15th day of September, A. D. 1916, at plaintiff's special instance and request, and for

its benefit, defendants furnished six workmen for re-booming a raft of logs at Duncan Canal, Alaska, which work continued for a period of nine hours, making a total of fifty-four (54) hours. That the same was actually and reasonably worth and of the value of 50¢ per hour, or a total of \$27.00, and that no part of the same has ever been paid.

WHEREFORE defendants demand that plaintiff take nothing by this action, but that defendants have judgment against plaintiff for the sum of \$2,580.16, with interest on the sum of \$1,584.20 since the 16th day of September, A. D. 1916, and interest on the sum of \$757.46 since the 14th day of August, 1917, together with defendants' costs and disbursements herein.

JOHN RUSTGARD,
Attorney for Defendants.

United States of America,
Territory of Alaska,—ss.

Gordon D. McDonald, being first duly sworn, deposes and says: That he is one of the defendants above named; that he has read the foregoing answer and that he believes the same to be true.

GORDON D. McDONALD.

Subscribed and sworn to before me this 5th day of October, A. D. 1917.

[Notarial Seal]

JOHN RUSTGARD,
Notary Public for Alaska.

My commission expires September 14, 1918.

Service of the foregoing answer by receipt of copy this 5th day of October, 1917, is hereby admitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Oct. 6, 1917. J. W. Bell, Clerk.
By John T. Reed, Deputy. [6]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1669-A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

R. E. SHENK and GORDAN E. McDONALD, as
Copartners, and R. E. SHENK and GOR-
DAN E. McDONALD, as Individuals,
Defendants.

Reply.

Comes now the plaintiff, and for reply to the affirmative matter contained in the answer, denies each and every allegation therein contained, and for reply to first, second, third, fourth and fifth counterclaims, the plaintiff denies each and every allegation in said counterclaims contained.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn, on oath deposes and says: That he is the agent of the plaintiff, the Worthen Lumber Mills; that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

H. S. WORTHEN.

Subscribed and sworn to before me this 15th day of
March, 1918.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Dec. 15, 1921.

Copy received Mch. 12th, 1918.

J. RUSTGARD.

Filed in the District Court, District of Alaska,
First Division. Mar. 15, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [7]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD, and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Defendants.

Bill of Particulars and Statement of Account.

Comes now the plaintiff and files the following bill
of particulars and statement of account in the above-
entitled cause:

June 9,	Ch. on a/c.....	\$500.00
27,	a/c Stpg.....	1,245.00
"	On a/c	700.00
July 20,	a/c Stpg.....	550.00
Aug. 12,	On a/c	1,500.00
Oct. 12,	"	1,000.00
" 15,	"	1,000.00
" 30,	"	1,000.00
	Stpg.	244.74
		<hr/>
Total debits.....		\$7,739.74
1916a/c.....		74.42
		<hr/>
		\$7,814.16

1916 a/c

May 2, Ptg. Bay Raft. 148,060 ft.

June 26, Pt. Malsbury

Raft. 343,480 ft.

July 25, Pt. Malsbury

Raft 397,770 ft.

Sept. 21, Duncan Canal

Raft 413,050 ft.

1,302,360 ft. \$6.00 \$7,814.16

[8]

1916.

Oct. 12, a/c Stpg..... \$1,050.00

1917.

Jan. 3, On ac. 1,200.00

15, " 500.00

A/c Stpg. 300.00

Mar. 10, On a/c 2,000.00

Apr. 11, " 3,000.00

vs. Worthen Lumber Mills.

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20,	“	2,000.00
May 16,	a/c Cable	256.00
23,	on a/c	1,000.00
24,	a/c Stpg.	1,000.00
June 15,	on a/c.	2,000.00
28,	a/c Stpg.	.....	300.00
30,	on a/c.	.....	1,500.00
Aug. 14	“	.....	1,000.00
	1 Skiff	.....	25.00
	59 Boom chains	.....
	3.00	.....	177.00

Total debits,.....\$17,308.00

1917	a/c		
Raft # 1,	264,783 ft.	\$6.50.....	1,721.09
“ # 2,	246,338 “	“ “	1,601.20
“ # 3,	211,803 “	“ “	1,376.72
“ # 4,	170,665 “	“ “	1,109.33
“ # 5,	209,973 “	“ “	1,364.82
“ # 6,	252,230 “	“ “	1,639.50
“ # 7,	270,476 “	“ “	1,758.09
“ # 8,	198,301 “	“ “	1,288.96
“ # 9,	225,481 “	“ “	1,465.63
“ #10,	308,955 “	“ “	2,008.21

2,359.005

Total credits.....\$15,333.55

Dr. bal..... 1,974.45

\$17,308.00

\$1,974.45
74.42

\$1,900.03 Total dr. Bal. [9]

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn, on oath deposes and says: That he is an agent of the Worthen Lumber Mills, plaintiff in the above-entitled action; that the above is a true and correct statement of account and bill of particulars in the above-entitled cause.

H. S. WORTHEN.

Subscribed and sworn to before me this 15th day of March, 1917.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Dec. 15, 1921.

Filed in the District Court, District of Alaska, First Division. Mar. 16, 1918. J. W. Bell, Clerk. By John T. Reed, Deputy. [10]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD as Individuals,

Defendants.

Bill of Exceptions.

This cause came duly on for trial before the Honorable Robert W. Jennings and a jury of twelve men at the courthouse at Juneau, Alaska, on the 15th day of March, 1918, the jury having been duly empaneled and sworn, and the respective parties having made their opening statement to the jury, Hellenthal & Hellenthal appearing for plaintiff and John Rustgard appearing for defendants, the following proceedings were had:

Testimony of H. S. Worthen, for Plaintiff.

H. S. WORTHEN, being called as a witness on behalf of plaintiff, testified on direct examination as follows:

My name is H. S. Worthen; I am manager and treasurer of the Worthen Lumber Mills, the plaintiff corporation; as such manager of the Worthen Lumber Mills I made a contract with Schenk & McDonald, the defendants, in 1916, and another contract in 1917 for cutting certain logs. The contract for 1916 is dated March 27, 1916, it is signed Schenk & McDonald Logging Company by G. D. McDonald, Manager. I signed one copy of that contract on behalf of the Worthen Lumber Mills and sent that copy to G. D. McDonald. I maintain now that logs were [11] delivered under this contract in 1916. (The contract referred to was offered and received in evidence and marked Plaintiff's Exhibit "A" and the copy hereto attached). The duplicate of this exhibit "A" was signed by myself

(Testimony of H. S. Worthen.)

for Worthen Lumber Mills. The first thing I think that was done under that contract was Mr. McDonald told me he had a little boom of logs at Portage Bay left over from the year before, I think—and wanted to know if I would take them—under the contract—to apply on that contract—and we did. That was the first little boom we got and then after that he decided not to go down to Prince of Wales logging at that time and he said he had some logs at Port Malmsbury that he would like to apply on this contract and I told him we would accept them. I made the remark that if we went down to Port Malmsbury that it was a bad place and I thought it would only be just for him to help us as far as Cape Fanshaw and he said he would do that. We went down to Port Malmsbury and got the first boom and his boat came through to Juneau with that first boom that we got there. He said he was coming here anyway and he thought he might as well keep hooked on. The second boom that we went down to Port Malmsbury to get he started to help us and his boat broke down at Burnt Island and they left us.

I will say that I am quoting from the log of the gas-boat; I was not there. In addition to the logs we received from Portage Bay and Port Malmsbury under that contract, we received in the fall—September—he had some booms down in Duncan Canal and we had one boom [12] from there. Duncan Canal is on the other side of Petersberg. It is this side of Sumner Straits, and under the original contract they were to be cut on the north end of Prince

(Testimony of H. S. Worthen.)

of Wales Island and they would have to come north through the Sumner Straits. Duncan Canal is nearly parallel with Wrangel Straits. I understand that McDonald helped the boys up as far as Cape Fanshaw with the boom from Duncan Canal. The boys went down for the boom and when they came back they reported that McDonald's boat helped them as far as Fanshaw—I think it was.

As far as I was concerned I did not know anything about whether they were going to help them or not. It was a matter for McDonald himself. The Portage Bay raft was 148,060 feet. The first one from Port Malmsbury was 343,480 feet; the second one from Port Malmsbury was 397,770 feet, and the Duncan Canal raft was 413,050 feet. We had a man by name, John Stevenson, who scaled those logs. John Stevenson is not one of our regular men. He owns a fur store down on Front Street—a taxidermist, I think. He has been working at that here. I employed him for the purpose of scaling. I got him to scale those logs. It is his scale of those rafts that I have given you.

Under that contract I paid Schenk and McDonald on June 9, 1916, \$500; June 27, we paid stumpage for McDonald, \$1,245 and gave him a check for \$700; July 20, we paid him \$550 on stumpage; August 12, gave him a check for \$1,500; October 12, gave him a check for \$1,000; November 15, we gave him a check for the second \$1,000; November 30, gave him another \$1,000, and [13] paid stumpage of \$244.74, the total being \$7,739.74. These items are the same

(Testimony of H. S. Worthen.)

that are set out in our bill of particulars. The value of the logs delivered under the 1916 contract which I have mentioned would amount to \$7,814.16. The first negotiations for the 1917 contract was started some time in the summer of 1916—I don't just remember what part, but I think the first thing that really resulted in anything tangible was, I went down to Portage Bay and met Mr. McDonald and went looking over some timber that we had agreed to take the next year. We did not enter into the written contract until the next January. We paid up the stumpage for this sale so they could go to work before the contract was entered into.

Plaintiff's Exhibit "D" is the contract entered into for the year 1917 on the 4th day of January of that year. It was signed by Schenk and McDonald, by G. D. McDonald. (Plaintiff's Exhibit "D" offered and received in evidence and a copy of which is hereto attached). The payment for stumpage referred to was \$1,050 paid October 12, 1916; January 3, we gave him \$1,200 on that contract; January 15, \$500 and paid \$300 for stumpage; March 10, gave him \$2,000; April 11, \$3,000; April 20, \$2,000; May 16, paid for some cable for him; \$256; May 23, gave him \$1,000; May 24, paid \$1,000 stumpage; June 15, gave him \$2,000 on account; June 28, paid \$300 stumpage; June 30, on account \$1,500; August 14, \$1,000 and in addition we charged him with a skiff he had for his boat, \$25; 59 boom chains at \$3 a piece, \$177. We delivered the skiff to him and he agreed to pay \$25 for it. The whole amount thus paid him under the

(Testimony of H. S. Worthen.)

1917 contract was \$17,308. The first boom of logs under that contract came into the mill April 2. It was 264,783 feet; the next boom we received April 11; [14] it was 246,338 feet; the next boom we received April 23, 211,803 feet. May 3, 170,665 feet; May 15, 209,973 feet; May 21, 252,230 feet; June 12, 198,301 feet; June 28, 270,476 feet; June 26, 225,481 feet; July 15, 308,955 feet; it was ten booms in all aggregating 2,358,928 feet; figured at the rate specified in the contract of 1917 those logs would come to \$15,333.55.

The rafts and their measurement, together with the payments I have testified to, are the same as set out in the Bill of Particulars. The balance due Worthen Lumber Mills on the two transactions is \$1,900.03. I had the logs scaled while they were in the water before they were cut up. They were scaled by the same man, John Stevenson, the same man who scaled the logs in 1916.

On cross-examination, the witness testified:

The contract of 1916 contemplated a purchase of logs from the Government on Prince of Wales Island. That was the talk at the time. We had not made any bid to the Government for logs on the north part of Prince of Wales Island at the time the contract was signed. I don't know what he had done. I don't know whether he had bid or not. He was working down there he told me getting out piling.

Q. As a matter of fact he told you that he had not but he intended to apply for logs at that place when

(Testimony of H. S. Worthen.)

he signed the contract, didn't he?

A. I don't remember him telling me any such thing as that.

Q. Do you remember now having any talk with him at or about the time the 1916 contract was signed about him applying to the Government for logs on Prince of Wales Island?

A. He said that was where he expected to get them. That is why we made [15] the contract that way.

Q. Where were you when you discussed that contract with him?

A. Oh, I think I was here in Juneau.

Q. Was he here on or about the time this contract was signed?

A. I don't think so. I think I mailed him the contract to Petersburg and asked him to sign them and read them and then I signed one and sent it back to him—that is my recollection of it.

Q. Had you talked to him about this sale before the contract was prepared? A. Yes.

Q. Where did you talk to him about it?

A. I think it was here in Juneau—that is my opinion.

Q. How long before the contract was executed?

A. I cannot remember, I am sure.

Q. Couldn't you state approximately?

A. No, I couldn't.

We had bought two or three booms at Portage Bay that he cut out for James in 1916 and this was a little boom of some forty or fifty thousand that was

(Testimony of H. S. Worthen.)

left over from that sale. Personally I have never seen that little boom. I was down there in 1916—went down there personally with the tug boat and got a boom and went up in the timber and looked at the boom he had cut up. We got some in 1916, some timber in the fall of 1916.

I don't know where the logs were out in Duncan Canal, whether it was up at the head or down Beecher Passway. We did not get any logs from Prince of Wales Island in 1916. He would not deliver any logs to us from that place. The only logs which he delivered to us in 1916 were one raft from Portage Bay; two rafts from Port Malmsbury, and one from Duncan Canal. The rafts [16] are usually scaled as soon as they come in here to the mill. Sometimes they lay for a month or six weeks and sometimes they are put in the upper bay and lay there three months before they are scaled by my men. I have the record of only one of the rafts scaled in 1916; of the records of the last boom. I did not have the time when the first booms were scaled. There is nothing on the records to show by whom they were scaled—only that I remember it. We have lost records of those three booms. I remember that Stevenson scaled them. We did not always enter the scale in the books as soon as he gave us the scale. I usually kept it in my desk. They were not always entered in the books. The last boom in 1916 was entered at the time it was scaled, September 22d, I think it was. That is the boom from Duncan Canal. One was entered on the books

(Testimony of H. S. Worthen.)

May 2d; another on June 26th, and the third, July 25th. These were the days we gave Schend and McDonald credit for those booms. They must have been scaled before that time. I don't see how they could enter them until they were, but I couldn't swear to that just now. The boom from Duncan Canal was lying at the mill at the time it was scaled by Stevenson. I wasn't out on the boom. I was there at the mill at the time. Referring to the rafts delivered under the contract of 1917, the scale which I have testified to is the scale which Stevenson gave me. I think every raft but one was scaled at the mill. One raft was scaled at the booming ground up here by Price's Point. The days they were scaled are the days given in my testimony already. The days given in the bill of particulars. They are the days copied from the original scale-book. I do not know whether or not these rafts had been scaled by the Government rangers prior to the time Stevenson scaled them. I think there were one or two rafts that came up [17] here before they were scaled. I don't know who scaled them. I do not know whether they were scaled here before or after Stevenson scaled them. I think Mr. Babbit scaled them but I didn't see him. He is one of the rangers located at Juneau. My impression is that Mr. Babbit scaled the boom that was put out at Price's Point. If they had been scaled before Stevenson scaled them I would not necessarily have known it. They are supposed to mark them when they scale them but they don't do it—not always. They are

(Testimony of H. S. Worthen.)

supposed to scale them and put their identification mark, the number of the boom and the number of the pieces on the swifter. But this last year it was very seldom that they did that.

We gave McDonald credit both for the spruce and for the hemlock delivered. I furnished Stevenson the calipers used in scaling the logs. I have had them ever since I came to Juneau. I think it is about five years the 26th day of last February since I landed here. Those calipers are now down at the mill office.

Testimony of John R. Stevenson, for Plaintiff.

JOHN R. STEVENSON, called as a witness on behalf of plaintiff, after being duly sworn, testified as follows:

Q. What is your name? A. John Stevenson.

Q. Where do you reside? A. Juneau.

Q. How long have you lived in Juneau?

A. About three years and a half—something like that.

Q. What has been your business since you have been in Juneau?

A. I have worked at the taxidermist trade some.

Q. Have you done anything else besides that?

A. Yes.

Q. What was that? A. Scaling logs.

Q. When did you first start to scale logs, or work in connection with logging? A. 1900. [18]

Q. When did you first begin scaling—how long have you been engaged in that?

(Testimony of John R. Stevenson.)

A. About 18 years.

Q. How long have you followed that as your business? A. Up until the last three years.

Q. It was your business exclusively?

A. Logging and scaling.

Q. Whereabouts did you work at that business?

A. Down on the Sound, Pierce County, King County and Lewis County, Washington.

Q. For whom did you first scale logs, Mr. Stevenson?

A. I first scaled logs for the Junction Mill Company in Puyallup Valley.

Q. In the State of Washington?

A. Yes, in the State of Washington.

Q. How long did you stay with them?

A. I was about four years there.

Q. Where were you after that?

A. I logged for myself.

Q. Where was that?

A. On the Puyallup River.

Q. About how much scaling did you do in the Puyallup Valley for the company you first talked about—about how much scaling?

A. It would be pretty hard to say the amount of scaling that was done.

Q. Did you work at it continuously?

A. Yes, sir; fairly steady; not absolutely doing that altogether but we worked steady cruising and logging.

Q. And then you say you went to work for yourself? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. Can you give us any idea how long you worked at this business for yourself, Mr. Stevenson?

A. 14 years.

Q. Logging and scaling and buying?

A. Yes, sir.

Q. Can you give the jury an estimate of how many acres you scaled during that last period?

A. Pretty hard to estimate it.

Q. It would be impossible to do that?

A. Yes, sir. [19]

Q. Did you work at it continuously—or more or less continuously?

A. Well, while I was logging for myself I would be called on to cruise timber here and there for different people, prospective buyers and such as that.

Q. You have done a great deal of that kind of scaling?

A. Yes, cruising; and I have scaled for people, found out how much waste there was, and how much of the log was left, and such as that; also logs that were brought to salt water, for the Tide Water Mill, St. Paul and Tacoma Mill Company, and also for the Fort Layton people.

Q. So you would say you have had at least 16 years experience at scaling? A. Yes, sir.

Q. Did you do any scaling for the Worthen Lumber Mills? A. Yes, sir.

Q. When did you first start to scale for them?

A. I believe it was in 1916.

Q. Do you remember scaling some logs for them that came from Schenk and McDonald that year?

(Testimony of John R. Stevenson.)

A. Yes, sir.

Q. Do you remember scaling a boom of logs that came from Duncan Canal that year? A. Yes, sir.

Q. Or said to have come from Duncan Canal. Have you the scale of that boom of logs?

A. I have the scale of one boom of logs here—I will see what it is. Yes, there is a scale of a boom from Duncan Canal. This one here (indicating). It is the only one I have from that canal.

Q. By what method were they scaled?

A. Well, they was scaled there—

Q. By what rule?

A. Scaled by the Scribner rule.

Q. Prior to scaling that boom of logs were you familiar with a [20] certain contract for logs entered into between McDonald and Schenk and Worthen Lumber Mills?

A. Well, yes, in one way. Mr. Worthen told me that they were not supposed to have any 34 foot logs in the boom, and to scale them as 32.

Q. Have you the scale that you made of the Duncan Canal boom? A. Yes, sir.

Q. Does that scale that you have there correctly represent the scale of the logs in that boom?

A. Yes, sir.

Q. Scaled by you? A. Yes, sir.

The COURT.—Counting 34 foot logs as 32 feet?

A. Yes, sir.

Mr. HELLENTHAL.—This was under the contract in which they did not count 34 foot logs as 32. He gave him those instructions during one contract,

(Testimony of John R. Stevenson.)

but that was the last contract. The scale speaks for itself. I offer this in evidence.

(Questions by Mr. RUSTGARD.)

Q. Did you prepare this yourself?

A. That was prepared from my scale, right off my book.

Q. By whom? A. By Mr. Worthen.

Q. By Mr. Worthen personally or some clerk of his? A. No, Mr. Worthen personally.

Q. Have you checked it over with your books?

A. We checked it at the time.

Q. Where are your books?

A. That scale was made—

Q. Where is the book you checked it with?

A. I haven't it; I turned that in to Mr. Worthen.

Q. And this is a copy of the book, which you prepared at the time you did the scaling, is that correct?

A. That was taken right from that.

Q. The result you made was in pencil?

A. Yes. [21]

Q. Now, was that put in a little book like the one you have now in your hand?

A. No, that was on a regular scale sheet—loose paper.

Q. And you turned that in to Mr. Worthen?

A. Yes, sir.

Mr. RUSTGARD.—I think it is a copy, your Honor, and I would like to have the original.

Mr. HELLENTHAL.—Mr. Worthen has already testified that the original of this one was lost.

Mr. RUSTGARD.—Not that one.

(Testimony of John R. Stevenson.)

Q. (By Mr. HELLENTHAL.) You compared this with Mr. Worthen? A. Yes, sir.

Q. And you know this to be a correct copy of your original? A. Yes, sir.

Mr. HELLENTHAL.—If you have any further objection I will call Mr. Worthen on it.

Mr. RUSTGARD.—I am willing for you to ask Worthen right there.

Whereupon H. S. Worthen was asked the following questions in regard to said list.

(By Mr. HELLENTHAL.)

Q. Have you the original of this?

A. I cannot find the original sheets—I have hunted all over the office but I couldn't find them. I made that copy at the time and put them in the files.

Q. You compared it with Mr. Stevenson's books?

A. I did; it was correct.

(Questions by Mr. RUSTGARD.)

Q. In comparing it you held the original and he held the copy?

A. I think I held this and he had his original himself. I don't recall just how we did it.

Q. (By Mr. HELLENTHAL.) You know it is a correct copy? [22]

A. I believe it is, yes, sir, to the best of our ability to check it over.

The COURT.—It will be received.

(Whereupon said list was received in evidence and marked Plaintiff's Exhibit "G.") (This exhibit is a typewritten document purporting to be a record of the Stevenson scale of the Duncan raft scaled Sep-

(Testimony of John R. Stevenson.)

tember 23, 1916, giving the length of each log scaled, the gross scale of the logs and the deduction for defects allowed by the scaler. The gross scale aggregates 451,520 feet. The deductions aggregate 38,470 feet; net scale being 413,050 feet.)

Whereupon the direct examination of John R. Stevenson was continued as follows:

Q. (By Mr. HELLENTHAL.) What is the total of the scale of that boom—how many feet of logs was in that boom? A. 413,050.

Q. That correctly represents the number of feet in that boom? A. Yes, sir.

Q. Mr. Stevenson, did you do any scaling for the Worthen Lumber Mills of logs received from Schenk and McDonald during the year 1917? A. Yes, sir.

Q. Have you the scale of the first boom that you scaled during that year? A. Yes, sir.

Q. Does that correctly represent the number of feet of logs in that boom? A. Yes, sir.

Q. How many board feet—were they measured according to the Scribner rule? A. Yes, sir.

Q. How were 34 foot logs counted—how were they measured?

A. I am confused on these two contracts. I will say I was not informed in regard to those 34 foot logs until later on.

Q. The second contract, the 1917 contract, you were informed [23] that 34 foot logs should be scaled as 32 feet? A. Yes.

Q. And the 34 foot logs in this boom were scaled as 32 foot logs? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. How many feet were there in the first boom that you scaled?

A. I didn't figure these up to the exact amount there was in the boom. These are not figured up by me.

Q. But the original figures—

A. The original figures of the scale are mine.

Q. What is the total of them?

Mr. RUSTGARD.—He says he has not figured it out.

Mr. HELLENTHAL.—The whole amount is there—it would be only a matter of calculation. He testifies he hasn't added it up.

The COURT.—Put the book in and let the calculation be made.

The WITNESS.—This addition is by someone else.

Q. How many pages does the scale of the first boom cover? A. 264,783 feet.

Q. Are the pages numbered in the book?

A. No—about 10 pages.

Mr. HELLENTHAL.—I now offer the first 9 pages of this book as being the scale of boom No. 1, made by Mr. Stevenson.

Mr. RUSTGARD.—No objection.

(Whereupon the first 9 pages of the said book were received in evidence and marked Plaintiff's Exhibit "H.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 276,508 feet.

(Testimony of John R. Stevenson.)

The deductions aggregate 11,725 feet for the raft; the net scale of the raft as shown by this exhibit is 264,783 feet.)

Q. Did you scale another boom for the Worthen Lumber Mills that came from Schenk and McDonald? A. Yes, sir. [24]

Q. And they were correctly scaled, were they?

A. Yes, sir.

Q. And that scale is accurately given in your scale-book? A. Yes, sir.

Q. What pages does that cover, from pages 10 to 17? A. Yes, sir.

Q. Inclusive? A. Yes, sir.

Q. And does that accurately represent the scale of the second boom of logs received by the Worthen Lumber Mills from Schenk and McDonald in 1917?

A. Yes, sir.

Q. What is the total in board feet?

A. 246,338.

Q. You didn't add up those figures yourself?

A. No.

Mr. HELLENTHAL.—I ask that those pages from 10 to 17 inclusive be received in evidence.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "I.") (This exhibit purports to be detailed record of scale showing length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of this raft as shown by this exhibit is 254,029 feet; the net scale of the raft is 246,338 feet.)

(Testimony of John R. Stevenson.)

Q. Did you scale any other logs for the Worthen Lumber Mills received from Schenk and McDonald?

A. Yes, sir.

Q. You scaled a third boom? A. Yes, sir.

Q. Do pages 18 to 25 correctly represent the scale of the third boom of logs received by the Worthen Lumber Mills from Schenk and McDonald during the year 1917? A. Yes, sir.

Q. What is the total board feet of that third boom?

A. 211,803.

Q. What was scaled by you? A. Yes, sir.

Q. In the same method as the previous boom?

A. Yes, sir.

Mr. HELLENTHAL.—I now offer pages 18 to 25 inclusive, and ask that it be marked Exhibit "J."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "J.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 217,641 feet; [25] deductions 5,838 feet; net scale 211,803 feet.)

Q. I now direct your attention to pages 26 to 31 inclusive of your scale-book and ask you what that represents?

A. Another boom from Schenk and McDonald from Portage Bay.

Q. Is that the fourth boom? A. Yes, sir.

Q. Received by the Worthen Lumber Mills?

A. Yes, sir.

Q. Scaled by you? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. Do those pages correctly represent the scale of the logs of that boom as made by you?

A. Yes, sir.

Q. What was the number of board feet in that boom? A. 170,665.

Q. They were scaled by you as previously stated, by the Scribner log rule? A. Yes, sir.

Q. Scaling 34 foot logs as 32 feet?

A. Yes, sir.

Mr. HELLENTHAL.—I offer pages 26 to 31 inclusive of the scale-book in evidence and ask that it be marked exhibit “K.”

(Whereupon said pages were received in evidence and marked Plaintiff’s Exhibit “K.”) (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 179,983 feet; deductions, 9,318 feet; net scale 170,665 feet.)

Q. I now direct your attention to part of your scale-book commencing on page 32 and ending with page 37, and ask you what that is—what that represents?

A. A boom of logs from Schenk and McDonald.

Q. Was that received by the Worthen Lumber Mills? A. Yes, sir.

Q. Boom No. 5? A. Yes, sir, raft 5.

Q. Do those pages contain a correct scale of the logs in boom No. 5 as made by you?

A. Yes, sir. [26]

(Testimony of John R. Stevenson.)

Q. That scale was made by you with a Scribner rule? A. Yes, sir.

Q. According to the Scribner method?

A. Yes, sir.

Q. Thirty-four foot logs were scaled as 32 feet?

A. Yes, sir; on this scale.

Q. And what is the total amount in board feet in that boom? A. 209,973.

Mr. HELLENTHAL.—I ask that those pages, beginning at page 32 and ending at page 37 be received in evidence and marked Plaintiff's Exhibit "L."

Mr. RUSTGARD.—No objection.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "L.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 221,960 feet; deductions, 11,987 feet; net scale 209,973 feet.)

Q. I now direct your attention to that section of your scale-book commencing at page 38 and ending on page 45, and ask you what that represents?

A. A raft of logs from Schenk and McDonald.

Q. That is No. 6 raft? A. Yes.

Q. Do those pages of your scale-book just referred to represent the accurate scale of the logs in that boom as scaled by you? A. Yes, sir.

Q. Were the logs scaled with the Scribner rule?

A. Yes, sir.

Q. According to the Scribner method?

A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. And were 34 foot logs scaled as 32 foot logs?

A. Yes, sir.

Q. And what was the total number of board feet contained in that boom?

A. This sum total here is kind of funny—I didn't do this addition myself.

Q. You cannot read it?

A. Yes, I can read it but just what that [27] is is not plain to me.

Mr. HELLENTHAL.—I now offer in evidence that section of the scale-book commencing on page 38 and ending with page 45, and ask that it be marked Plaintiff's Exhibit "M."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "M.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 259,918 feet; deductions, 7,688 feet; net scale, 252,230 feet.)

Q. Now, I direct your attention to that portion of your scale-book commencing with page 46 and ending with page 50, and ask you what is contained in those pages?

A. A raft of logs from Schenk and McDonald.

Q. Is that the sixth raft?

A. I think it is the seventh.

Q. It is a raft of logs received from Schenk and McDonald by Worthen Lumber Mills in the year 1917?

A. Yes, sir.

Q. Does that scale contain a correct scale of that

(Testimony of John R. Stevenson.)

boom of logs made by you? A. Yes, sir.

Q. And that was made with a Scribner rule?

A. Yes, sir.

Q. Thirty-four foot logs scaled as 32 feet?

A. Yes, sir.

Mr. HELLENTHAL.—I now offer that portion of the scale-book commencing with page 46 and ending with page 50, both inclusive, in evidence and ask that it be marked exhibit "N."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "N.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale [28] of the raft referred to is 211,285 feet; deductions 12,984 feet; net 198,301 feet.)

Q. I now direct your attention to that part of your scale-book commencing on page 51 of your scale-book and ending in the middle of page 57, purporting to be a boom of logs received from Schenk and McDonald on June 28, 1917, and ask you if that is a scale made by you?

A. Yes, sir; this scale was made by me.

Q. Does it correctly represent the number of feet in the boom? A. Yes, sir.

Q. Scaled by Scribner rule? A. Yes, sir.

Q. Thirty-four foot logs scaled as 32 feet?

A. Yes, sir.

Q. What is the number of feet in that boom?

A. The sum total here would be 198,301.

Mr. HELLENTHAL.—I now offer pages 51 to the

(Testimony of John R. Stevenson.)

middle of page 57, inclusive, of the scale-book, and ask that it be marked Plaintiff's Exhibit "O."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "O.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 241,655 feet; deductions 16,174 feet; net 225,481 feet.)

Q. I now direct your attention to that portion of your scale-book commencing in the middle of page 57 and running to 65 inclusive, which purports to be the scale of a boom of logs, boom No. 7, of Schenk and McDonald, and ask you if that [29] represents the scale made by you of that boom?

A. Yes, sir.

Q. Does that correctly represent the number of feet in that boom? A. Yes, sir.

Q. Made by the Scribner rule? A. Yes, sir.

Q. Thirty-four foot logs counted as 32 feet?

A. Yes, sir.

Q. How many board feet were there in that boom?

A. 270,476.

Mr. HELLENTHAL.—I now offer that portion of the scale-book, commencing in the middle of page 57 and ending on page 65, inclusive, and ask that it be marked Plaintiff's Exhibit "P."

Mr. RUSTGARD.—No objection.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "P.") (This exhibit purports to show the length of each log scaled,

(Testimony of John R. Stevenson.)

the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 281,168 feet; deductions 10,692 feet; net 270,476.)

Q. I now direct your attention to that portion of your scale-book commencing on page 66 and continuing on to page 74, inclusive, which purports to contain the scale of a boom of logs received by the Worthen Lumber Mills from Schenk and McDonald.

A. Yes, sir.

Q. Was that scale made by you? A. Yes, sir.

Q. Does that correctly represent the logs and number of feet in that boom? A. Yes, sir.

Q. What is the total number of feet in that boom?

A. 308,955.

Q. That scale was made by you? A. Yes, sir.

Q. It was made by the Scribner rule?

A. Yes, sir.

Q. Thirty-four foot logs were scaled as 32 feet?

A. Yes, sir.

Q. Do the scales that have been previously introduced in evidence, made by you, do they show the gross scale of the logs, [30] the number of feet contained in each log? A. Yes, sir.

Q. Do they also show the discounts?

A. Yes, sir.

Q. How are the discounts indicated?

A. Indicated by a mark—1 for a discount of 10 off; 2 for a discount of $\frac{1}{5}$; 3 for $\frac{1}{3}$ and 4 for $\frac{1}{4}$, and a half is considered a cull. That is the way it is

(Testimony of John R. Stevenson.)

marked in this book—that is my system of marking off defects.

Q. Is there any indication in that book which explains that system, in the front part of that book?

A. Yes, it is marked here in the front part so it could be understood by anyone who looked at it.

Mr. HELLENTHAL.—I now offer that portion of the scale-book from page 66 to page 74 inclusive, and ask that it be marked Plaintiff's Exhibit "Q."

Mr. RUSTGARD.—No objection.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "Q.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 326,585 feet; deductions 77,630 feet; net 308,955 feet.

Q. Now, all these scales contained in this book have all been made by you according to the same methods?

A. Yes, sir.

Q. Using the Scribner rule? A. Yes, sir.

Q. And scaling 34 foot logs as 32 feet?

A. Yes, sir.

Q. You also made the scale of the booms the year before? A. Yes, sir.

Q. The four booms? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

[31]

Cross-examination.

(By Mr. RUSTGARD.)

Q. Mr. Stevenson, you testified as a witness for

(Testimony of John R. Stevenson.)

Mr. Worthen or the Worthen Lumber Mills at the time of the injunction proceedings last summer or fall? A. I believe I did.

Q. You had this book with you at that time?

A. I think so.

Q. Have you made any changes in the book since that time? A. No, sir.

Q. What time did you make these writings in ink signing your name?

A. At the time I done the scaling. I signed the book whenever I brought it into the office, I signed up for that boom and signed my name to it.

Q. Now, was anybody with you at the time you did the scaling? A. Sometimes there would be.

Q. Do you remember now who was with you at any particular time when you scaled?

A. Yes, I used to get a fellow to mark for me.

Q. What do you mean by marking?

A. Set down the figures.

Q. To write down in this book here what you told him? A. Yes.

Q. Who was that?

A. I had a boy by the name of Allen Fortney to do some of that.

Q. Where is he now?

A. He is going to school here; he is in town.

Q. These figures put down in this book, they are not actually yours? A. Not all of them, no.

Q. How large a percentage do you think are yours?

A. Well, there are not a great deal of them mine in that.

(Testimony of John R. Stevenson.)

Q. You always had a boy to do the writing for you?

A. Sometimes a boy or some other man I could get to take figures for me.

Q. Who furnished the boy or the man?

A. I generally got him *himself*. [32]

Q. Who paid him? A. I paid him myself.

Q. You couldn't say now which are your figures and which are somebody else's figures in this book?

A. Yes, I can tell my own figures.

Q. Is that anything to show here into how many logs you divided a stick? A. Yes, it shows there.

Q. Explain to the jury how that is shown.

A. Where we scaled a long log—say it was long enough to be scaled three times—if it was a 60 foot log and we scaled it into three twenties, we designated the three logs by making a little curve and putting the three in a little half moon we made there to designate it was a long stick scaled three times; we would put down the figures of the three scales, and then we would draw a little half circle or moon to show that that was one long stick.

Q. In the third column counting to the right occasionally occurs a figure such as 2 or 3 or 4—

A. Yes.

Q. These are the figures which you testified show how much you discounted? A. Yes.

Q. Now, you have, for instance, in the second column from the left the figure 680, the third column marked 2—what does that indicate?

A. That indicates the log was rotten and we docked it $\frac{1}{5}$.

(Testimony of John R. Stevenson.)

Q. And the figure you have put down in the second column is the figure you got after making the deduction of the cull?

A. No, this is the full sum total scaled, and that has to be deducted from it, Mr. Rustgard.

Q. The figure in the second column is the full measurement of the log? A. Yes, sir.

Q. Without any deduction? A. Yes, sir. [33]

Q. Now, then, who carried out the deductions?

A. I don't know.

Q. Now, these figures which you have given there as the sum total, is that the sum total of each raft after your deduction is taken away, or is it the sum total of the measurements?

A. I didn't add those up, and I don't know, Mr. Rustgard, whether the deductions were made or whether it is the sum total.

Q. Now, where was the first raft lying—the one from Duncan Canal which you claim to have scaled in September, 1916—when you scaled it?

A. Those rafts—I think that raft was lying at the mill when it was scaled.

Q. Do you know whether it was or not?

A. Yes, positive of it.

Q. Was Worthen there at the time it was scaled?

A. I don't know as he was on the boom, but he was around the place there somewhere.

Q. You have a clear recollection that he was around the place? A. Yes.

Q. Do you know how long after the boom got into the mill before it was scaled?

(Testimony of John R. Stevenson.)

A. I would say within a few days, because I don't know just when the boom did come into the mill, but it couldn't have been but a few days.

Q. Was it at the log pond when you scaled it?

A. No, it was right at the mill in the usual boom ground there.

Q. Outside of the log pond? A. Yes.

Q. Do you remember where the boom was which was the first one in 1917 that you scaled?

A. The first I scaled was laying right at the boom ground outside of another boom that was there.

Q. Outside of another boom?

A. Outside of some other logs; I don't know whether it was a full boom or not. [34]

Q. Do you know how long that had been there before you scaled it?

A. I don't think it was over a day or two.

Q. How do you know it came from Schenk and McDonald? A. I don't know.

Q. You don't know? A. I don't know.

Q. Where was the second boom you scaled in 1917 when you scaled it?

A. It was laying in the same place.

Q. How do you know that came from Schenk and McDonald? A. I don't know it.

Q. Do you remember where the third boom was when you scaled it in 1917? A. Yes.

Q. Where was that?

A. It was up the bay here tied to some pilings up in the log pond here.

Q. Who was with you when that was scaled?

(Testimony of John R. Stevenson.)

A. Oh, I had Allen Fortney to mark the figures for me on that boom.

Q. How long had that been there before you scaled it?

A. Well, I don't know how long it had been there.

Q. How do you know that came from Schenk and McDonald?

A. I couldn't swear that it did.

Q. Do you remember where the fourth boom was when you scaled it?

A. That would make the fourth boom.

Q. Where was the fifth one?

A. The fifth one was down at the mill.

Q. Do you know how long that had been there before you scaled it?

A. Well, it had not been there very long.

Q. How do you know that came from Schenk and McDonald?

A. Nothing only what they would tell me and what marks I could see.

Q. What marks did you see?

A. Well, the mark on it wouldn't particularly designate anything only the ranger's mark there down in that country. [35]

Q. What ranger mark did you see on that?

A. Well, I don't know as I have got any of them in the book there. It was some marks cut on them once in a while that a person would notice. I don't know that I have got any of the marks of this scale.

Q. The same is true of the other booms—you don't know who they came from? A. No.

(Testimony of John R. Stevenson.)

Q. Now, what time was it that you made that copy of your scale of the Duncan Canal boom?

A. That was only a day or two, or two or three days after we had scaled the boom.

Q. How did you happen to make that in type-writing?

A. Well, Mr. Worthen called me in and asked me something about some big logs that were in the boom—he said, “I see your scale represents some big logs in the boom that must be bad,” and we were talking about it, and we went to work on that and made a copy of it, and he asked me to go over it with him.

Q. He said you must have made a mistake—that you counted some big ones that were too bad, is that right?

A. He didn't say anything about any mistake, but he asked me what kind of a boom it was; he said my scale showed there must be some big bad logs in it.

Q. How did that show in your scale?

A. Showed just the same as that there (indicating).

Q. How does that show there are some big bad logs?

A. Well, if you notice here, some of them are marked culls.

Q. There is a figure 26, to the right of which is marked 4—what does that mean—26 feet thrown out?

A. That means a cull log or a log that is absolutely no good.

(Testimony of John R. Stevenson.)

Q. What does the 26 stand for?

A. The scale of that log. [36]

Q. It scaled 26 as good—in other words if you counted it good it would count 26 feet?

A. No, if I scaled a log I would put down the full scale, and then if a log is absolutely worthless it would be marked a cull, but the full scale is put down always.

Q. Now, will you tell the Court what that figure 26 stands for?

A. If you will add a cipher there, as the Government does, that will be 260 feet.

Q. What does the 260 feet stand for—is it the measurement of the log, or what is left after throwing out some cull?

A. No, it is the full scale of the log—what lumber would be in the full scale of the log, and that log being rotten would be called a cull.

Q. Entirely? A. Entirely—it is worthless.

Q. So those figures to the immediate left of the word “cull,” in your exhibit “G,” should not be counted in adding up the total scale of that raft?

A. No, they should not.

Q. They should be thrown out?

A. They should be thrown out.

Q. In adding up that raft did you throw it out?

A. I didn't add up the raft myself; it was done on the adding machine.

Q. You say there should be a cipher added to those figures to the left of the word cull?

(Testimony of John R. Stevenson.)

A. There is always a cipher left off on a Government scale-stick.

Q. Did you use the Government scale-stick there?

A. Scribner scale.

Q. Do you always leave off that last cipher yourself? A. No, I always add it.

Q. Why did you leave it off here?

A. That was a matter of keeping it straight. Here on the scale-stick this cipher is not on the scale-stick—if it is 260 the cipher is not on it, and it leaves off that decimal; but I always add it on my books [37] because it kept me more straight in putting down my figures and keeping them right.

Q. If your scale-stick leaves off that last cipher isn't it just exactly the same as the Government scale-stick in that respect? A. Yes.

Q. That is what is called the "decimal C. scale," isn't it?

A. I don't know what you call it, but that is the way the scale-stick reads.

Q. Where, for instance, at the top of the fourth column from the left there is a figure 120, that should be, if written in full, 1200, is that correct?

A. Yes, sir.

Q. And the system of dropping the last figure is adopted for convenience sake? A. Yes, sir.

Q. And your scale-stick drops it? A. Yes, sir.

Q. I call your attention to a column, the top of which is marked "Waste" and a certain figure—for instance, 19, 6, 3, 6, 41—what does that stand for?

A. I know what 19 stands for in some places.

(Testimony of John R. Stevenson.)

Q. You knew at one time. You knew what 19 stood for at the time you put it there?

A. No, I didn't put it there.

Q. Who do you think put it there. Wasn't it on the original sheet from which you made this copy?

A. No, I took the figures from the original sheet, and what deductions and culls there was.

Q. That is not an exact copy of the original sheet, then?

A. It is so far as the lengths and diameters and scales are concerned.

Q. Where are the diameters shown?

A. Here is the length of the log (indicating).

[38]

Q. The length of the log is shown in the first column to the left, and the full scale is shown in the second column from the left—is that correct?

A. This would be shown on the left and this on the right there.

Q. Now, then, the diameter is not shown at all, is it? A. No.

Q. Was it shown on the original sheet?

A. No, it wasn't shown on that.

Q. Now, in the column, at the top of each is marked "Length" and "Gross," and there are various figures such as 22, 38, 12, 30, 46—what do they stand for?

A. I don't know—I don't know what those figures stand for. All I do know is that we took the length and the amount of logs from the original sheet, but what those are for I don't know—but these diam-

(Testimony of John R. Stevenson.)

eters and scale was taken from the original sheet.

Q. Do you know what is the difference between a Scribner and a Decimal C? A. No, I don't.

Q. Have you seen the Decimal C.

A. No, I don't know as I ever used that scale.

Q. Have you ever used Scribner's?

A. Yes, sir.

Q. Is that a Scribner you have been using?

A. Yes, sir.

Q. That is the one furnished you by Worthen?

A. Yes, sir.

Q. You are sure that is not a Decimal C?

A. Well, it is just like all Scribner sticks I ever used before.

Q. You are not the owner of a pair of calipers yourself? A. No, sir.

Q. Now, Mr. Stevenson, you have been working with lumber a good while and you are able to judge the distance of a stick, the length of a stick without measuring it, pretty well, aren't you?

A. Oh, yes, sometimes. [39]

Q. You feel pretty safe in judging the length without measuring it, don't you?

A. Not always. It is a good plan to measure them.

Q. In measuring these logs did you always lay them off into the number of sticks which you have testified to and which you scaled with a rule?

A. I measured them, every one.

Q. You measured with a stick? A. Yes.

Q. You didn't just step them off?

(Testimony of John R. Stevenson.)

A. Oh, no, no.

Q. Didn't you exercise your judgment and determine by looking at it how far it would be down to the next place? A. No, sir.

Q. Never? A. No, sir.

Q. You didn't take your book and open it every time and put the stick down, did you?

A. I did; I measured it with an 8-foot stick.

Q. And when you came to the proper place did you always put on the calipers? A. I think I did.

Q. On the Sound you followed the custom of measuring the top of the stick, didn't you, as a rule, and then estimating the place at the other places where the log was supposed to be cut?

A. We would estimate at the end if we couldn't get to it—if the end was in bad water we would do that, but that wasn't the case here. I could always get on to the sticks and "calip" them.

Q. You scaled a good many other rafts besides those you have testified to here? A. I think so.

Q. You were kept pretty busy scaling for Worthen? A. No, not usually very busy.

Q. You scaled every one he got to his mill, as far as you know?

A. I think I did—I don't know as I did, but I think I did. [40]

Q. He got rafts from a good many other loggers?

A. Yes.

Q. And as far as you know you scaled them all?

A. I may have.

Q. Have you scaled logs for anybody else here?

(Testimony of John R. Stevenson.)

A. I have scaled some logs for people who have brought them in that has come up to get me to scale them.

Q. Who were they?

A. I don't know their names.

Q. How long is that since?

A. That was some time last summer or last fall.

Q. How many logs were there?

A. I think I scaled a couple of other booms of logs for parties.

Q. Who were they?

A. I couldn't tell you their names.

Q. Where were those booms brought to?

A. The booms at the time were tied up down here at Mr. Worthen's place.

Q. Who asked you to scale those?

A. I cannot remember his name—in fact, I wouldn't remember his name if he had told me.

Q. Last fall?

A. Yes, I think there was one last fall and another along in the summer, if I remember it right.

Q. They were logs that were sold to Worthen?

A. I don't know that they were.

Q. They were at his mill?

A. They were tied up there.

Q. Do you know now where those calipers are which you have been using doing this scaling?

A. No, I don't.

Q. Whose calipers did you use when you scaled the booms belonging to the other people?

A. I used Mr. Worthen's calipers.

(Testimony of John R. Stevenson.)

Q. What is your occupation, Mr. Stevenson, at the present time?

A. Why, I have been a taxidermist here in town.

Q. How long have you been working for Worthen?

A. I have not been working for Worthen very much—I drove a few piling down there on the dock this winter for a few days.

Q. You were watchman for him last winter at the mill? [41] A. Yes, for a little while.

Q. And you are working for him now, aren't you?

A. No.

Q. When did you quit?

A. Oh, I haven't been working for him—I haven't done anything down at his place for over a month, I guess—something like that.

Q. Whenever there is anything to be done at the mill you are called in to help do it?

A. Not necessarily.

Q. Not necessarily I know, but what work has been done there has been done by yourself this winter, hasn't it? A. Oh, no.

Q. By others? How much of the time have you worked for Worthen this winter?

A. Oh, probably 15 or 20 days, something like that.

Q. How long were you watchman?

A. Last summer.

Q. How long?

A. I think that was something like 28 days, maybe.

Q. You testified about your experience as a scaler, now, you said that you were scaling for the Junction Mill four years—was that the only thing you did for

(Testimony of John R. Stevenson.)

them, scaled? A. Well, pretty near.

Q. Now, how much of the four years did you spend scaling for them?

A. You see, they had a log contract with a party that they had to have the logs scaled on the land, and the man had to be on the job all the time to scale those logs when they came on to the mill landing.

Q. Who else scaled there with you?

A. They had no other scaler but me when I was there.

Q. How long have you been in Alaska?

A. About three years and a half.

Q. Have you done any other logging or scaling in Alaska except what you have testified to here?

A. No. [42]

Q. You said something about scaling 34 foot logs as 32 feet—do you know how many 34-foot logs you found in these rafts? A. No, I do not.

Q. Do you remember finding any. A. I do.

Q. In what rafts?

A. I don't know as I could tell you what raft, but I remember of finding some of those logs. I think some of them are designated in the book—I ain't sure.

Q. Do you think you could find them?

A. I think I can, if my memory serves me right.

Q. You noted separately what you threw off for the extra 2 feet?

A. Yes, they were scaled as 32 feet logs—any 34 foot ones.

Q. All right, look at the record and see if you can

(Testimony of John R. Stevenson.)

find any 34-foot log which scaled at 32.

A. Well, here is one; if you can go by my way of knowing I will show you one; right there is a 34 foot. Anything marked 32 with an X behind it is a 34 cut down to 32 feet, by my way of knowing.

Q. Very well. In this scale-book which is in evidence wherever there is a log marked with the length 32 feet, and you put an X in front of it—

A. X behind it.

Q. I call that in front of it, but it is all right—it is on the left of the figure? A. Yes.

Q. That indicates that it was a 34 foot log?

A. Yes, sir.

Q. Have you any way of estimating how much was thrown off, or how much the two feet thrown off amounted to in board measure?

A. You could get it by looking at the scale of the 34-foot logs, because here is your diameter and your length; and then if it was a 34-foot log would give you the correct scale of the log.

Q. Very well. Take on page 15, the second column from the right, there is a figure 32 with an X to the immediate left of it—what is the diameter of that log?

A. I couldn't tell you [43] the diameter of that log until I looked at the stick.

Q. Could you figure up from your records how much was thrown off from these rafts by reason of some logs being 34 feet long?

A. I think they would be shown in this book, the logs that were 34 feet.

(Testimony of John R. Stevenson.)

Q. Can you, by the use of that book, figure out how much has been thrown off from each raft by reason of counting 34 foot logs as 32 feet?

A. I could.

Q. I will ask you again these questions. Wherever the figure one occurs to the immediate right of the scale, that stands for a deduction of 1/10th?

A. Yes, sir.

Q. And wherever the figure 2 occurs, that represents a deduction of 2/10ths? A. 1/5th.

Q. That is the same thing; and 3 represents how much? A. A third.

Q. And 4? A. Deducts a fourth.

Q. When one-half is to be deducted how is that represented?

A. I always call a log that is half rotten or spoiled a cull.

Q. And you marked it as such? A. Yes, sir.

Q. And you would indicate that in the scale?

A. Yes, and mark it a cull.

Mr. RUSTGARD.—That is all.

(Whereupon court adjourned until 9:30 to-morrow morning.)

MORNING SESSION.

March 16, 1918, 9:30 A. M.

JOHN R. STEVENSON, upon being recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Stevenson, you have been asked on cross-

(Testimony of John R. Stevenson.)

examination as to whether you worked as watchman for the Worthen Lumber Mills? [44]

A. Yes, sir.

Q. Was that before or after these scales were made? A. It was before that.

Q. What did you do first, the scaling or the watching?

A. The scaling was done first. I haven't done any scaling since I was watchman there.

Q. Had you done anything for the Worthen Lumber Mills except scaling before these scales were completed?

A. Yes, I had; I had worked down on the pier for Mr. Worthen sometimes.

Q. When was that?

A. I couldn't tell you when it was, but it was some little work on the pier there.

Q. You were never regularly employed by Mr. Worthen? A. No, sir.

Q. Before that? A. No, sir.

Q. Nor since that time? A. No, sir.

Q. And in making these scales, did you have any interest in the scale, whether it was made large or small?

A. No, sir; none whatsoever.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RUSTGARD.)

Q. You testified, Mr. Stevenson, that where you scaled a log that was 34 feet long as a 32 foot log,

(Testimony of John R. Stevenson.)

that you put a cross to the immediate left of the figure? A. Yes.

Q. Now, did you put any crosses to the immediate left of any other figures than those logs you so scaled?

A. All the time—any single logs.

Q. Whenever timber was so short that you scaled it as one stick, you put a cross in front of it?

A. Yes, sir.

Q. So that these crosses to the immediate left of these figures would indicate that it was just one stick? A. Yes, sir. [45]

Q. It does not necessarily indicate that it was 34 feet long?

A. If you notice in running through that book you will find a cross and a V behind it.

Q. What does that mean?

A. That would be an exact 32.

Q. Find one of them for me. I suggest you step down to the jury so that they will have a chance to see the method you are talking about keeping in that book.

A. Here is what I was speaking about. (Indicating.) You see this here—see I made a mark here and a V there.

Q. Now, while you have the book here, the column to the left indicates the length of the log as scaled, and the second column from the left indicates the scale? A. Yes, sir.

Q. These figures where you have a cross in front, or immediately to the left, indicate a single log?

A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. Now, yesterday on cross-examination didn't you testify that the way in which you identified the 34 foot logs which you scaled as 32 feet, was by the cross in front or immediately to the left—did you so testify?

A. Yes, and my explanation of that, they would have to be traced by the scale-stick.

Q. Now, didn't you, in response to my question as to how you identified the logs which were 34 feet and which you scaled as 32, state that it was by the cross in front? A. Yes, sir.

Q. Now, you admit, do you not, that all the single logs have a cross in front?

A. With the exception—I want to get a chance to explain my whole theory of keeping it.

Q. Didn't I ask you to explain to the jury how you identified them, and didn't you say you identified them by a cross in front of them—that all the 32 foot logs with a cross in front of them were really 34 foot logs which you scaled as 32 feet—isn't that the explanation you gave yesterday? [46]

A. I didn't understand it that way, Mr. Rustgard.

Q. Very well. Now, who put in this V which you have pointed out? Did you?

A. I did in that work right there.

Q. Who put the other signs in there?

A. That is this boy's writing there—the boy did that.

Q. Now, if you will take what purports to be the scale of the booms on May 3d, 26th and 31st, do you there find, according to your definition, any 34 foot

(Testimony of John R. Stevenson.)

logs that were scaled as 32?

A. Yes, according to that, there would be two there.

Q. Where are they?

A. Well, those two there.

Q. Where is your check-mark there, the V—you identify it, you say by a check-mark? A. Yes.

Q. Show the jury the check-mark.

A. There would be no additional check-mark.

Q. There isn't any there, is there? A. No.

Q. How do you know these two logs you pointed out to the jury were 34-foot logs?

A. Well, I just started to make them so.

Q. (By a JUROR.) Are those 30 or 32? A. 32.

Q. (By a JUROR.) Is there a check-mark on it?

A. No, there is an X behind it.

Q. (By Mr. RUSTGARD.) You say behind it—you mean to the left of it; I think you and I do not agree on what is the front end and what is the rear end. A. There is one.

Q. On page 28, in the first column, there are two notations of 32 each, meaning 32 long, does it?

A. Yes.

Q. Now, there is an X to the immediate left—you call that in the rear of the figure, do you.

A. I call it before the figure.

Q. In front of the figure? A. Yes. [47]

Q. That figure you showed the jury is the first column in the book, is it not? A. Yes.

Q. There are two logs marked 32 long, with a check-mark to the immediate right? A. Yes.

Q. Now, you said that check-mark indicated to

(Testimony of John R. Stevenson.)

you that they were really 34-foot logs surveyed by you as 32, didn't you?

A. No, I didn't say anything of the kind. I said they were exact 32-foot logs.

Q. Now, then, do you find any reference in that book except on the front page to those check-marks?

A. I don't see any of them.

Q. The only two check-marks you have been able to find in that book are those two in the first column on the first page, is that not right? A. Yes, sir.

Q. Now, then, do you want to be understood to say at this time, Mr. Stevenson, that all the other logs in that book marked 32, single logs, were really 34 but scaled as 32—is that it?

A. There were a lot of 34.

Q. All that haven't that check-mark, were they 34 scaled to 32?

A. No. There is any length log with that check-mark behind it, you would know was a single log.

Q. That check-mark indicates it is a single log, does it? Does it indicate anything else?

A. No, it doesn't, only they can be traced by the scale-stick to find the length of the logs.

Q. What does X in front of that figure stand for?

A. Single log.

Q. Then the X and the check-mark stand for the same thing, do they? A. No.

Q. What is the difference in designation? What does the check-mark mean to you? What does the X mean to you? [48]

A. My way of marking the identity of a certain

(Testimony of John R. Stevenson.)

length of a log. If you understand me right, the 34 foot logs, or 32 foot logs, or any other length log, can be traced on the back by the use of a scale-stick.

Q. Did you bring the scale-stick this morning?

A. Yes, sir.

Q. Will you take your scale-stick and trace one of those for us so we will see how it is done? How much variation have you got here? (Referring to scale-stick.)

A. I don't know how much you can get.

Q. Did you say this was a Scribner?

A. Yes, sir; that is a Scribner rule on there.

Q. How do you know?

A. I know the figures that are used by the Scribner rule—the figures are just the same.

The COURT.—What do you call that appliance that you hold in your hand?

The WITNESS.—This is a caliper scale.

Q. I call your attention now to page 28 of this scale-book, to the first column, a log marked 32 and with a cross in front—will you determine now whether or not that was really a 34 foot log or not?

A. 2140?

Q. Yes, that is the one I have reference to.

A. 2140 is scaled as a 32 foot log.

Q. Is it a 34 foot log or it is a 32 foot log?

A. If I was going to say I would say it was a 34 foot log scaled as 32.

Q. Now, will you explain to the jury how you found that from that scale?

A. You see, whatever your diameter is here and 32

(Testimony of John R. Stevenson.)

foot in length, and then it runs out here, and this says 32, and it would give you the exact number of feet in it, and in a 32 foot log, or other length log, on the back you could find the diameter by knowing how long it was. Now, 2,140 feet [49] would come here on a 32 foot scale, and by the use of that in that way you could trace the scale on the back.

Q. And what would show you that this would be the diameter. Which side would that be?

A. This side here.

Q. How do you know that that was not a 34 foot log scaled by you as a 32 foot log?

A. From my mark I would say it was a 34 foot log.

Q. What is your mark?

A. Just the mark in front of it to show that there wasn't anything else but the 34 feet.

Q. Now, then, inasmuch as you have already said that none of the logs which in this book are marked 32 have any check-mark in front of them except the two on the front page, would you say that all the logs in that book scaled by you as 32 were really 34—is that correct?

A. I don't understand your question.

Q. You have testified that you put the check-mark in front of two of the logs scaled by you as 32 feet to indicate that they were really 34 foot logs—that is correct, is it? A. Yes.

Q. Will you take this book again and look at it? You have testified that there are two logs in that book scaled as 32 feet long which were really 34 feet?

(Testimony of John R. Stevenson.)

Mr. HELLENTHAL.—I object to that—that is just the opposite to what he has testified to.

Mr. RUSTGARD.—I think that is true to a certain extent because he has testified both ways. Now, I want to see which way is correct. Haven't you stated, Mr. Stevenson, that those logs in that book which are shown as scaled as 32 feet, single logs—

A. Yes, sir.

Q. And which really were 34 feet long, are indicated by a check-mark in front? A. No, sir. [50]

Q. Very well. We will put it the other way, then. You mean to testify that all the logs scaled by you as 32 feet, and which have a check-mark in front, were 32 feet in fact, and not 34—is that correct?

A. Those that has a little V mark would be an exact 32 foot log.

Q. Now, then, would you say that all the other logs which have been scaled by you as 32 feet long and have no such check-mark were in fact 34?

A. All the rest?

Q. Yes. A. No, I wouldn't say that.

Q. How do you know? Can you tell from that book which were 34 and which were 32, and those which were scaled at 32?

A. Well, it might be possible such a thing that I could not tell them.

Q. Have you anything by which you can tell at all?

A. Well, I have my mark there which I indicated for those lengths.

Q. But have you anything but that check-mark

(Testimony of John R. Stevenson.)

which you have testified to?

A. No, I haven't anything but the check-marks to go by.

Q. And you have that check-mark used only twice on the first page, is that correct?

A. It may be different places in the book.

Q. Look and see.

A. I didn't see any when I was looking through it.

Q. I would like to have you look through that book and find out whether that check-mark is used any other place than the two places on the front page.

(Whereupon a recess was taken for five minutes.)

Q. Mr. Stevenson, did you examine the book looking for those check-marks? A. Yes, sir.

Q. Did you find any? A. No, sir.

Q. You testified that you scaled some logs here this fall for [51] some other parties at the mill?

A. I did.

Q. Who paid you for that?

A. I haven't been paid for it yet.

Q. Who did you send your bill to?

A. I look to Mr. Worthen to pay me for those scales.

Mr. RUSTGARD.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Stevenson, I direct your attention to the book and refer you to page one, which shows a 32 foot log with an X in front of it and a V behind it—two crosses there? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. As I understand, you have testified that that means that those logs were 32 foot logs scaled as 32 foot logs? A. Yes.

Q. And that they were single logs?

A. Single logs, yes, sir.

Q. Now, we come to page 18 of the book. I show you two 32 foot logs there with X in front and no V behind, nothing behind it—would it be possible for you to say absolutely whether those were 32 foot logs or 34 foot logs? A. I wouldn't say.

Q. Cannot say positively? No, sir.

Q. Did you try to keep up this matter of putting a check-mark back of them?

A. Yes, I had a system like that but for some reason it looks as though I didn't do it in this book.

Q. Now, Mr. Stevenson, will you take the calipers and show the jury how you put a caliper on a log, and your system of measuring these logs?

A. Well, we most generally go out on a log, and in calipering a log you will find the logs in the water will most generally ride the wide way in the water, and you caliper this way—keep your calipers flat here, and then stick the calipers out like this, and you look that way; then you turn your calipers up and down on the log the other way and it will give you any difference in the round of that [52] log. Your log may be 4 to 6 inches wider one way than it is the other; and then calipering that way, and dividing the difference between the extreme wide area and the extreme narrow, is midway, and in figuring that way it gives the difference in a log that isn't

(Testimony of John R. Stevenson.)

round, and we determine the distance by putting the calipers on this way, and the figures give the amount, the scale, and the length of the log. [53]

**Testimony of H. S. Worthen, for Plaintiff
(Recalled).**

H. S. WORTHEN, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. S. HELLENTHAL.)

Q. Now, Mr. Worthen, as manager of the Worthen Lumber Mills, do you know whether or not the scales made by Stevenson under—ran or over-ran the lumber actually sawed out of those booms?

A. We were hiring a man to tally—

Q. Just answer my question—do you know?

A. Yes, I do.

Q. Does the lumber sawed out of those booms exceed Stevenson's scale?

A. I think in two instances only on the ten booms that we got a little more out than what Stevenson scaled.

Q. And the others sawed less?

A. We run under.

Q. And the actual cut was less than Stevenson's scale? A. On the whole total it was.

Q. On the total of the ten booms it was less?

A. Yes, on the total it was.

Mr. HELLENTHAL.—You may cross-examine.

(Testimony of H. S. Worthen.)

Cross-examination.

(By Mr. RUSTGARD.)

Q. Who checked the mill run of the booms here in question? A. Charley Ehlman.

Q. Is he here? A. No, he isn't.

Q. Who is he?

A. He is a tally-man I got from Puget Sound.

Q. How old a man was he?

A. I would say he is a man of 30 or 32 years of age.

Q. Did he tally all the logs or lumber run through your mill? A. Yes, sir.

Q. Did he reserve the record?

A. We haven't that record.

Q. What did you do with that record?

A. It was lost.

Q. How did it happen to get lost?

A. Well, each day's tally [54] was brought in and left on my desk on a little slip of paper that he made out, and I just put them in a pigeon-hole in the desk until the whole boom was cut and tallied up and then I threw them away; they were never entered in the book.

Q. Did you enter on the book each sheet, each tally, which he handed in? A. No, we did not.

Q. Why didn't you?

A. I didn't consider it of importance enough to do that. I wasn't figuring on a lawsuit—if I had been I would have entered them.

Q. How long did you keep those tally-sheets before you threw them away?

(Testimony of H. S. Worthen.)

A. I don't know. They laid around the desk there until they were lost or thrown away. There are a few of them down there now. I saw them last night in the desk.

Q. Could you state approximately how long they were there? A. No, I couldn't.

Q. How long did it take to saw up two hundred and fifty or three hundred thousand feet?

A. We cut an average of about 40,000 a day. Of course that varies—sometimes it comes down as low as 22,000, and sometimes as high as 65,000—depends on the logs and conditions.

Q. What other job did Ehlman have at the mill besides tallying? A. Nothing.

Q. He was kept there just for that purpose?

A. Yes, we hired him for that—of course you understand that a tally-man back of the trimmer saws keeps a record to know when the bills are cut out. He has got a list the same as a trimmer-man has, so he knows when each order is cut up, but he did no other manual work except that. [55]

Q. Now, when you testified in the injunction proceeding, when you were testifying about the tallying at the mill, I ask you whether or not you made the following answer to the following question asked by me: "Q. Have you no way then from the records in your office of determining how the mill-run compares with the boom scales? A. As I said, the way we done it—of course it may not be a very business-like way, and maybe not the way that some people do business, but we have tried several times to get an

(Testimony of H. S. Worthen.)

expert tally-man who would tally here and stay through the season; one landed in jail; another quit and went outside, and this one is still here, but he hasn't been able to keep the check at all times; in other words, he cannot grade the lumber and tally it too. Understand what I mean? As it comes from the saw there may be a dozen pieces of lumber come through in two minutes, and he cannot grade it and tally it at the same time; and it has been more important to the company, it has seemed to me, to grade the lumber than it was to tally it. If we have a boom of logs come in that we see there is no clear lumber in, and it isn't worth trying to grade, we tally it up and check it off against the scale; but if we find it is a boom of pretty good logs and with a little extra care he can select the good pieces, we drop the tally and grade it. In order to grade and tally we would require two men; and for that reason when he tallied a boom, each night he would take it in the office on a little slip of paper and lay it down on my desk, and when the boom was done I figured it up and compared it, and the slips of paper went into the waste-basket." That was your answer, was it?
[56]

A. I could not remember it word for word; that was about the condition at the mill. When we were cutting clear timber we did that, but the logs that came from Portage Bay did not make that kind of lumber.

Q. You testified, too, at that time that the logs from Portage Bay were exceptionally fine timber?

(Testimony of H. S. Worthen.)

A. I think I did.

Q. Didn't you state that it was such an exceptionally high grade of timber that nothing like it could be secured anywhere else?

A. No, I didn't testify to anything like that.

Q. Didn't you assign that as the reason for applying for the injunction?

A. I never did say anything like that. I might have signed something like that, but I never thought anything like that in my own mind. I might say that out of the timber we got from Portage Bay the Government would accept as suitable stuff a trifle over one per cent.

Q. I thought you testified yesterday, Mr. Worthen, that you scaled the hemlock in the booms and gave McDonald credit for it?

A. That is my understanding, that he did; I didn't go on the booms to see whether he did or not.

Q. You sawed that anyway?

A. We cut everything that came in the boom that was worth cutting; the rest was turned adrift.

(Witness excused.)

H. S. WORTHEN, recalled as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Worthen, do you know which booms of logs the mill received from Schenk and McDonald?

A. Yes, ten booms. [57]

Q. Are those the same booms of logs that Mr. Ste-

(Testimony of H. S. Worthen.)

Worthington scaled, and has testified to? A. Yes, sir.

Q. You know that personally? A. Yes, sir.

Q. Are you acquainted with the boom of logs received by the Worthen Lumber Company that came from Duncan Canal in 1916? A. Yes, sir.

Cross-examination.

(By Mr. RUSTGARD.)

Q. You were not on the boat when the tug hooked on to the rafts to tow them up here?

A. No, I was not.

Q. Were you here always when your tug came in with a raft?

A. They might have come in with one or two rafts when I was not here; I was out to the Westward about a week; the rest of the season I was except about a week, from Monday to Friday, I was out.

Q. You didn't check Mr. Stevenson's scale of the rafts? A. On the water?

Q. Yes. A. I didn't rescale after Mr. Stevenson.

Q. Didn't make any note of how many culls there were, or bad logs there were?

A. Only as they came up in the mill; I observed them as they came up in the mill.

Q. You didn't stay in the mill and watch each log, did you?

A. No, but I was there practically all of the time—10 hours a day—I was there often enough to see the logs coming up.

Q. Have you figured up on your exhibit "G" the amount of culls and the deductions.

(Testimony of H. S. Worthen.)

A. It is figured up here.

Q. What are the deductions, including culls?

A. I think it is figured 38,470 feet. [58]

Q. What is the total scale? A. 451,520.

Q. 451,520 feet is the total scale, from which you deduct some 38,000 feet, is that correct?

A. That is what it is here—I haven't checked this over for a long time—I haven't been over it recently, and I might be mistaken on the exact figures, but I have a note on the bottom of the page.

Q. Your statement is right there on that schedule you hold there, isn't it?

A. Why, it is unless there is some error in it.

Q. You referred to the first logs from Portage Bay being good timber—you mean the logs delivered in 1916?

A. No, the first part of 1917 I am speaking about.

Q. The first logs under the 1917 contract were good logs? A. Very fair logs.

Q. And they kept getting worse? A. They did.

Q. Stevenson made allowance for the splits, did he not? A. I suppose he did—he should.

Q. That is the scaler's business?

A. Supposed to be.

Q. He made allowance for rot—that is also the scaler's business?

A. That is his business—I suppose he did—I do when I am scaling.

Q. Did you count the number of pieces in each raft as you received them?

A. They are counted and signed for at the camp.

(Testimony of H. S. Worthen.)

Q. They are counted at the camp?

A. Yes, supposed to be.

Q. They are supposed to be? A. Yes.

Q. Sometimes they didn't bring in all the pieces they hooked on to, did they?

A. As far as I know they did. There was no report came in of any shortage, not from this camp. We lost a whole boom last fall, and they reported that; and they lost a part of another boom in November.

Q. Didn't your men lose some logs out of a boom they got from McDonald?

A. Not that I know of. Of course I don't know [59] what transpires on the water any further than what they report when they get here.

Q. Didn't you testify in this court on the injunction proceeding that you knew of one raft where your men lost half a dozen sticks?

A. I don't recall it now.

Q. Did I ask you this question on that examination: "And that is all that has been delivered under the contract?"

A. Yes, sir. I would like to add by way of explanation that in one of those booms there were five logs lost out of the peak coming up, for which, in looking over the books, I discovered there had been no allowance made to Mr. McDonald"—did you so testify?

A. I might have—I don't recall it at this moment.

Q. For all you know there might have been several logs lost?

A. They might have lost them all for all I know,

(Testimony of H. S. Worthen.)

but they got here with some—I wasn't out on the boat on a single trip.

Q. Under the contract the logs were yours when you hooked on to them at Portage Bay?

A. That is what the contract says.

(Witness excused.)

**Testimony of J. R. Stevenson, for Plaintiff
(Recalled).**

J. R. STEVENSON, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. I hand you here your scale-book and ask you whether or not the second column of each scale—what that contains?

A. It contains the full scale of the log.

Q. Including the rot, split and all? A. Yes, sir.

Q. What does the third column indicate?

A. It indicates the discounts—the waste that is in the log.

Q. Allowed for rot, split, and any allowance made?

A. Yes, sir, that is the deduction for defects.

(Witness excused.) [60]

DEFENSE.

**Testimony of Gordon D. McDonald, in His Own
Defense.**

GORDON D. McDONALD, one of the defendants herein, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. State your name. A. Gordon D. McDonald.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. I call your attention to the testimony of Mr. Worthen in reference to the contract made with him in writing in the spring of 1916—the 27th day of March, 1916, exhibit “A,” and ask you whether or not any timber was delivered by you at any time under that contract? A. Not as far as I know.

Q. You would know it?

A. I would know it if there was any delivered from the place that the contract states.

Q. What conversation, if any, did you have with Mr. Worthen about delivering timber under this contract of 1916?

A. We had no other statement until he asked if we had any logs he could get. We were in the piling business at the time the contract was written up, at the time it was sent to me, through a conversation that we had some time in the spring of the same season, and I had a piling camp at the place named in the contract there, or somewhere in the

(Testimony of Gordon D. McDonald.)

vicinity of that country there.

Q. That is on the north end of Prince of Wales Island? A. Yes.

Q. And this contract provides for the delivery of logs from that place. Now, then, what I asked you is after this contract was signed for logs from the north end of Prince of Wales Island did you have any talk with him as to why no logs could be delivered from there or should be delivered?

A. We had a talk, yes.

Q. What was that?

A. Mr. Worthen asked me if the timber was suitable or was very good and I told him I would look through [61] it. After looking through it the timber didn't appear to be very good so we did not apply for a sale.

Q. At the time you say you entered into the contract he asked you about the timber, and the quality of it? A. Yes.

Q. And you stated you thought it was all right?

A. I thought it was at that time—that is before I had looked through the timber.

Q. At that time you had not bought it from the Government? A. No.

Q. And you told him you would look it over again?

A. Yes.

Q. What did you tell him after you had looked it over?

A. I told him I didn't think the timber was very good.

Q. Did you apply for a sale?

(Testimony of Gordon D. McDonald.)

A. No, I did not.

Q. What time did you have that last talk with Worthen that you have testified to?

A. I think it was some time in the first part of April. I cannot say for sure.

Q. 1916? A. Yes, 1916.

Q. Anyway it was a short time after the signing of the contract? A. It was shortly after.

Q. Now, after that time did you deliver any logs to Worthen?

A. I delivered a boom from Portage Bay—a small boom of logs.

Q. How did you come to deliver those logs to him?

A. The captain of the "Carrita" was in Petersburg during the spring, towing logs from Hauseth camp across from Petersburg, and the captain asked me if I knew where they could get a boom of logs, that the mill was short of logs, and I told him that I had a boom that I had arranged the sale of with the Wrangell Mill Company, and I told him if it would benefit him in any way he could take it up with Mr. Worthen so he could get it, and he did, on his trip to Juneau that time, he talked it over with Mr. Worthen, and he came back and finally got the boom. [62]

Q. That was the only conversation you had with Mr. Worthen about the first boom from Portage Bay in 1916? A. Yes, sir.

Q. What time in 1916 was that?

A. That was in April, as near as I can recall—I don't know just the date.

(Testimony of Gordon D. McDonald.)

Q. After that did you deliver any logs to Worthen in 1916? A. We did.

Q. Now, where were those logs taken from?

A. Taken from Port Malmsbury in the south end of Kuiu Island.

Q. How did you happen to deliver those two?

A. A similar occasion.

Q. That isn't sufficient. Tell the jury who you conferred with in regard to it.

A. As far as my mind goes on that, I think I had a talk with Mr. Worthen in January here, after I was here in the spring, and he asked if he could get those logs, and he also took it up with the George E. James Company who had the logs or who the logs were put in for in the first place, and they refused to let him have them, as far as I understood from the conversation I had. The James Company afterwards told me I could dispose of them if I wanted to—that is, if I see fit they wouldn't hold them any further—they were not able to take them at that time.

Q. They were logs that were out for the James Company? A. Yes.

Q. And subsequently at the request of Mr. Worthen they released you? A. Yes.

Q. And you turned them over to Worthen?

A. Yes.

Q. And what time was that?

A. It was in June.

Q. June, 1916?

(Testimony of Gordon D. McDonald.)

A. Yes, about the 24th of June when their tug-boat came into camp.

Q. Into what camp?

A. Into the Malmsbury camp—Port Malmsbury.

[63]

Q. That was the "Carrita"?

A. That was the "Carrita."

Q. The "Carrita" took the raft in tow?

A. They took it in tow on the morning of the 24th, at 3 o'clock in the morning.

Q. Now, after that did you deliver any raft to Worthen that season?

A. We delivered a boom from Port Malmsbury around the 12th or 14th day of July.

Q. How did you happen to deliver that?

A. He sent his boat down there for logs.

Q. And they hooked on to the raft and took it?

A. Yes.

Q. Did you have any further conversation with Worthen in regard to that?

A. Well, we had a conversation here at the time, here in Juneau, that season, along about the middle of the season, in regard to logs in Duncan Canal, and he asked if he could get some logs from Duncan Canal, as near as I remember, and I told him I would give him a boom from Duncan Canal, and he got the boom in September.

Q. What time did you have that conversation with him?

A. That was in July, or around the first part of July, I think; it was during the time I was up on

(Testimony of Gordon D. McDonald.)

the boat that we helped them through here to Juneau on.

Q. Now, those 4 rafts you have testified to, the small one from Portage Bay, the two from Port Malmsbury and the one from Duncan Canal, were all surveyed or scaled by the Government rangers?

A. Yes, sir.

Q. Do you know which one of the rangers scaled the rafts?

A. Mr. Allen scaled the Duncan Canal boom and the Portage Bay, and I think, I wouldn't say for sure whether it was Babbitt or Peterson that scaled the Port Malmsbury timber; I think there was one of them scaled by Babbitt here in Juneau, and as to the other I don't know which one of the scalers did [64] scale it—the Government record will show that; their record will show the man who scaled it.

Q. Now, then, come to the contract for 1917, signed January 4th, were you in Juneau at the time that was signed up? A. Yes, sir.

Q. How many rafts did you deliver to Mr. Worthen or the Worthen Lumber Mills under that contract? A. Ten booms.

Q. When did you deliver the last boom to him under that contract?

A. Sometime in August, as near as I can remember; I couldn't state just the exact date.

Q. But sometime in August—do you remember whether or not it was the middle of July?

A. I couldn't say that. The last boom—

Q. The records would show.

(Testimony of Gordon D. McDonald.)

A. Yes, the records should show the date that it was delivered to them on.

Q. Did you deliver logs from Portage Bay in 1917 to anybody else but the Worthen Lumber Mills until this trouble came up? A. No, sir.

Q. After that you delivered some logs—

A. I delivered two booms to the George E. James Company.

Q. Subsequent to this trouble? A. Yes, sir.

Q. Now, then, the first ten booms cut, scaled and delivered from the Portage Bay sale were delivered to Worthen? A. The Worthen Lumber Mills.

Q. Where did he receive those rafts?

A. Portage Bay.

Q. His tug came and hooked on to them?

A. Yes, sir.

Q. Who were they scaled by?

A. They were scaled by ranger Allen, that is, with the exception of several booms that was towed before he could get around to scale them and they were taken through here to Juneau and ranger Babbitt scaled them [65] here in Juneau.

Q. Referring to the Duncan Canal boom which was hooked on to by the "Carrita" at Duncan Canal, do you remember where it was scaled?

A. Scaled in Beecher Pass.

Q. Where is that?

A. That is a small body of water between Wrangell Narrows and Duncan Canal.

Q. How did it happen to be scaled there?

A. It was scaled there after it was broken up by

(Testimony of Gordon D. McDonald.)

the Worthen Mills boat and towed back into Duncan Canal to be re-boomed, and ranger Allen was notified before the time or about the time their tug boat went through and he was on his way down there to scale the boom, and he met the boat there in Beecher Pass.

Q. And after the raft was put together again he scaled it? A. Yes, after it was re-boomed.

Q. Before you signed the second contract did you have an accounting with Worthen for your work in 1916? A. We mentioned it, yes.

Q. Did you agree upon the amount due?

A. We did not agree upon the amount due.

Q. At the time of adjournment this forenoon, Mr. McDonald, you were testifying to your negotiations with Mr. Worthen of the Worthen Lumber Mills, as to the contract for 1917—that was about New Years of 1917? A. Somewheres around there.

Q. You were here several days at that time?

A. Perhaps about a week—somewheres along there.

Q. Now, I would like to have you state what at that time was said between you and Worthen in reference to the account for 1916.

A. The question came up about a settlement of the 1916 business and Mr. Worthen, as near as I remember, said that there was something about the scale that he wanted to get [66] from some of the forest men in regards to the last boom, from Duncan Canal.

Q. What did you say, if anything, to that?

(Testimony of Gordon D. McDonald.)

A. I told him that I would get the scale from Allen, or I had got it, and I would send him a copy of it or give it to him the first time I saw him. I don't know just what was the conversation, but it was to that effect—it amounted to that, anyway.

Q. At that time was there anything said as to the towing bill?

A. Yes, the towing bill was brought up at the same time, or about the same time, and Mr. Worthen said he was willing to pay what was reasonable on the towing bill, and he asked me to make out a bill and send him covering the towing.

Q. Now, referring to your statement, the charge you have made was for logs sold Worthen according to the Government scale?

A. That is according to the Government scale.

Q. Furnished you? A. Furnished me, yes.

Q. The correctness of that you do not testify to of your own knowledge? A. No, I do not. [66-A]

Mr. RUSTGARD.—We wish to offer that statement, your Honor, for the purpose of being used by the jury as a memorandum of the witness' testimony.

Mr. HELLENTHAL.—I object to any scale made under the 1917 contract by anybody unless it is made in accordance with the contract. There is a provision in the 1917 contract which provides how this thing is to be settled and unless it is in accordance with that provision we object to the scale.

The COURT.—What is the point of your objection?

(Testimony of Gordon D. McDonald.)

Mr. HELLENTHAL.—This is our point. The 1917 contract provides that the mill scale shall be the scale to be used. In the contract it further provides that all logs shall be paid for in 30 days, and in case of a dispute the scale made by a disinterested party shall be the controlling scale.

The COURT.—What about the 1916 contract?

Mr. HELLENTHAL.—If your Honor please, the 1916 is the same but there is evidence here which disputes whether the logs were delivered under the contract or not, so I do not want to insist upon the 1916 contract. (Argument by both counsel to the Court.)

The COURT.—Gentlemen, I have thought about this contract and it seems to me that it should be read this way—I cannot see any other way to do it. “Said logs shall be scaled by the Scribner log rule, and the said first party agrees to accept the mill-scale.” That is printed. Then further down it says, “and in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery.” I cannot see how that [67] means anything but this: The logs shall be scaled at the mill and the result shall be accepted, and payment shall be made inside of 30 days unless within that time there is a dispute. Put the shoe on the other foot. Suppose a lot of logs were delivered at a mill and the mill scaler scales them and they amount to 500,000 feet more than are really in the boom. Suppose the

(Testimony of Gordon D. McDonald.)

Government scaler had scaled those logs before they had got to the mill and he found that there were 500,000 feet less than the mill scale shows it, but the mill man pays for those logs according to his scale—does not discover that there is anything wrong at all—does not dispute his own scale, and pays for them. The 30 days elapses and there is no dispute of any kind. Do you think the millman could go back to the logger and make him rebate the difference? The logger would say, “you paid me according to your scale?” “Yes.” “What right have you to come back on me? That was my contract. I was to take the mill scale and the mill scale was so much; I didn’t dispute it and you didn’t dispute it, and you have paid me and your 30 days is up.” How could the millman complain? Then how can the logger complain? A certain number of logs are delivered at the mill and they are to be paid for within 30 days and the mill scale is to be accepted unless there is a dispute, and there is no dispute, and the money is paid. I think the mouths of both parties are closed. I cannot see any other way out of it. If people make that kind of a contract there is nothing unreasonable about it—there is nothing unconscionable about it. I think it entirely depends on whether there was any dispute inside those 30 days—especially if [68] money has been paid within those 30 days or before any dispute has arisen. That being the case I do not think it is material what the forestry scale was.

Mr. RUSTGARD.—I will base my questions on

(Testimony of Gordon D. McDonald.)

the Court's ruling and ask questions for the purpose of getting my exceptions into the record.

The COURT.—Very well. Of course when you ask questions if it changes the situation at all my ruling may change. You cannot get me to rule and then ask a lot of questions outside of my ruling with the idea that they are covered by my ruling—they may be or they may not be.

Mr. RUSTGARD.—I will lead up to the point now and get the record in such shape that I can dismiss the forester if the Court adheres to that ruling after my questions.

Q. (By Mr. RUSTGARD.) Mr. McDonald, do you know what is meant by "mill scale"?

A. I don't know; as far as I know—

Mr. HELLENTHAL.—I object to that as attempting to vary the terms of a written contract. This contract provides what the mill scale is. It not only says mill scale, but designates the mill-scale—what it shall be.

The COURT.—I do not think you can ask him, "Do you know what is meant by mill scale?" He signed this contract, but you may ask him what is a mill scale? He is supposed to know what it is. He uses the term in his contract.

Q. Did you see the term "mill scale" used or hear it used before the time it was used in the contracts here?

Mr. HELLENTHAL.—I object to that because it was his duty before [69] signing the contract

(Testimony of Gordon D. McDonald.)

that the mill scale was to be used to ascertain what mill scale meant.

The COURT.—I do not think that question is competent. He uses the term in this contract. It does not make any difference whether he ever saw it before or not. You can ask him what it means.

Mr. RUSTGARD.—He has already answered that he doesn't know.

Q. At the time this contract was signed did you have any talk with Mr. Worthen as to what interpretation was to be placed upon it?

Mr. HELLENTHAL.—I object to that. The contract not only says it is the mill scale, but it provides that it shall be made by the Scribner rule. The Scribner rule is a well-known method of scaling logs.

The COURT.—Objection sustained. That is not the question. The question is what is a mill scale. He uses the terms of an industry that has its own phraseology, supposed to be known to the persons that are using it, but perhaps unknown to the jury. Now, he may be asked what is meant when the term "mill scale" is used between loggers and millmen, because the jury do not necessarily know what that means, but I think any representations made by Worthen to him as to what he understands by it, or by him to Worthen as to what Worthen understands by it, are all merged in the contract. Otherwise there would be no safety in making a contract.

Mr. RUSTGARD.—I will put the question again which I put before to the witness, with the Court's indulgence.

(Testimony of Gordon D. McDonald.)

Q. Do you know at this time what is meant by the term mill scale when used in a contract of this kind, or in the logging business?

Mr. HELLENTHAL.—I object to that as being incompetent. [70]

The COURT.—I think that question is competent—what is meant by the use of the word mill scale when used in a contract of this kind—that is, a contract between a logger and a millman. It is a technical term. He can answer what it means when so used.

A. I don't know just the way this question is put—we had a discussion—

Q. My question is do you know what it means? You can answer that yes or no.

A. I wouldn't answer it no; as far as I know at the present time it could lead up to many and various things.

Q. Did you have any discussion with Worthen at the time of the signing of this contract what it meant?

Mr. HELLENTHAL.—I object to that as incompetent.

The COURT.—What is the object of that?

Mr. RUSTGARD.—The object of it is to show that this witness at the time of signing this contract did not know what the term meant, that it was a new term to him and he asked Mr. Worthen to explain it and Mr. Worthen explained at that time what it meant, and it was in view of that explanation that the contract was signed by this witness. He relied

(Testimony of Gordon D. McDonald.)

upon that explanation and interpretation by Mr. Worthen.

Mr. HELLENTHAL.—I object to that for the reason that the term mill scale is a term that has a well-defined meaning in the logging business, and there is no allegation of fraud, your Honor, in the complaint any place, and for that reason the common accepted meaning of the words mill scale should control, and if he knows what that is he can give that to the jury, but that it is the limit.

The COURT.—I will sustain the objection.

Q. Mr. McDonald, after the logs or rafts were delivered to the towboat, the "Carrita," of the plaintiff company, you don't [71] know whether they reached the mill or not? A. I do not.

Q. Under the contract they were his when he hooked on to them? A. That was the agreement.

Q. Now, then, did you ever ask him for a statement or an accounting before this suit was brought?

A. We asked him for a statement at the time we came up here to settle for the year's business of 1916.

Q. And after that time did you ask him for any statement of the account for 1917?

A. Yes, we asked him at that time for a statement covering also 1917.

The COURT.—What time was that, Mr. McDonald?

A. That was at the time the dispute arose, and we had not received any scale at that time or any other time.

(Testimony of Gordon D. McDonald.)

The COURT.—What time was it that you asked him for a statement on the 1917 contract?

A. It was in the latter part of August, along about the 20th or 25th, somewhere along the last part—I couldn't say the exact date.

The COURT.—That was the first dispute you had?

A. That was the first—the first time we ever received a statement or a scale from the Worthen Mills. He had never issued any statement of his scale or anything about it.

Mr. RUSTGARD.—May it please the Court, I do not care to ask this witness any more questions at the present time. I would like to ask that the witness stand by and counsel can cross-examine him later on, and I will put one of the Government rangers on so as to get my evidence informally and get my exceptions.

The COURT.—Very well.

(Witness temporarily withdrawn.) [72]

Testimony of James Allen, for Defendants.

JAMES ALLEN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. State your name. A. James Allen.

Q. What is your occupation?

A. Forest ranger.

Q. You are familiar with this timber which you

(Testimony of James Allen.)

have heard referred to in this case as having been cut by Schenk and McDonald and sold to Worthen?

A. Yes, sir.

Q. Do you know where it was cut? A. I do.

Q. Is that on the United States Forest Reserve in this part of Alaska? A. Yes, sir.

Q. All of it? A. Yes, sir.

Q. It was sold to the logger under the rules of the Bureau of Forestry of the United States?

A. Yes, sir.

Q. How long have you been with the Bureau of Forestry as a forest ranger? A. Since 1908.

Q. What has been the principal part of your duties during that time in reference to logging?

A. Well, I am usually scaling.

Q. Scaling has been your principal duty. Now, how long have you been working with logs and lumber, Mr. Allen?

A. Ever since I was big enough to work.

Q. How long is that since, approximately?

A. Twenty-five years.

Q. You were brought up in the logging and lumbering business? A. Yes, sir.

Q. How did you learn to scale logs?

A. By working with a competent scaler and getting orders from him.

Q. Did you scale that raft of logs referred to as the Duncan Canal raft cut by Schenk and McDonald and turned over to Worthen in September, 1916?

A. I scaled all the rafts from that particular place.

(Testimony of James Allen.)

Q. Now, where was the raft when you scaled it?

A. If it is the [73] particular raft which I think it is I scaled it in Beecher Pass.

Q. It had gone to pieces and was put together again there? A. Yes, sir.

Q. Do you remember the date of your scale?

A. I have the records here.

Q. Will you refer to your records and state the date?

The COURT.—We can save a great deal of time if you make your offer of what you intend to prove by this gentleman—that the forestry scale of these logs was something different from the mill scale testified to by the plaintiff; then I will overrule your offer and you can take your exception.

Mr. RUSTGARD.—Very well.

The COURT.—There is no use to put a witness on and ask every question when you can accomplish the same thing by making your offer and having the Court rule on it.

Q. I will ask you whether or not you scaled that raft on the 15th of September, 1916. I think counsel will concede that is the same raft, will you?

Mr. HELLENTHAL.—I don't know exactly the date.

Mr. RUSTGARD.—It was hooked on to and was scaled by Mr. Allen on the 15th of September, 1916.

The WITNESS.—That is what I have here.

Mr. RUSTGARD.—That you scaled it?

A. Yes, sir.

Q. (By Mr. RUSTGARD.) Counting spruce and

(Testimony of James Allen.)

hemlock together, what did that scale?

Mr. HELLENTHAL.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Is the object and purpose of this, Mr. Rustgard, to show that the scale is something different from what has been testified to as being the scale of the mill? [74]

Mr. RUSTGARD.—My object is to prove that the scale testified to by Mr. Stevenson is fraudulent and not a true or honest scale of what is referred to as the Duncan Canal raft. Moreover, I propose to prove that if the scale made by Stevenson, as testified to by him, is not fraudulent it is of a different raft from the one which was delivered by Schenk and McDonald to the Worthen Lumber Mills.

The COURT.—Very well if you can prove it is a different raft you will be allowed to do so, but you must do so by somebody who knows what raft was delivered. You cannot prove what the Court thinks you are trying to prove under the guise of proving it was a different raft by somebody who doesn't know anything about what raft was delivered. Now, if this gentleman knows what raft was delivered he may testify, but it cannot be done by evasion and equivocation.

Mr. RUSTGARD.—I will prove by Mr. McDonald that this raft which Mr. Allen has testified he scaled is the one which he delivered to Worthen and for which he has charged Worthen.

The COURT.—The one that he delivered to Worthen?

(Testimony of James Allen.)

Mr. RUSTGARD.—That McDonald delivered to Worthen, or to the Worthen tow boat, and I submit to the Court, and I want it in the record, that at the present time there is nothing tangible to show that the raft which was surveyed or scaled by Mr. Stevenson is the raft which Mr. McDonald delivered to Worthen. I will state to the Court that I shall prove that the difference between the true scaled contents of the raft and the scale testified to by Mr. Stevenson is so great that either it proves it was not the same raft or else there was a fraudulent scaling. That the difference in the gross scale as well as in the lineal [75] feet is so great as to prove fraud.

The COURT.—If you can prove that the raft delivered was not the raft that was scaled I will permit you to do so. I shall instruct the jury, however, that the mill scale is the scale which governs, and that is the scale that they are to accept. If you can prove that the logs scaled were not the logs delivered it may be a different question.

Mr. RUSTGARD.—I will prove that the logs scaled by Mr. Allen were the logs delivered by McDonald. Now, then, whether or not these logs were the logs which Stevenson scaled, of course, I don't know and nobody else seems to know who has testified.

The COURT.—Proceed.

(Whereupon the last preceding question was read to the witness.)

Q. Counting spruce and hemlock together what did that scale?

(Testimony of James Allen.)

Mr. HELLENTHAL.—It is admitted under the ruling of the Court?

The COURT.—I permit the defendant to show that the logs delivered to Worthen under this contract of 1917 were not the logs that Worthen had scaled at the mill. If they are the same logs I shall instruct the jury that the mill scale is the scale that, under the terms of the contract, is to govern. Of course that has reference to the number of feet, in the logs.

Mr. HELLENTHAL.—Might I suggest then, your Honor, that we proceed in the ordinary course of proof with that—that we have the proof first as to the diversity of the rafts before we get the amounts of the rafts?

The COURTS.—Yes, I think I shall require that. I shall require that this witness testify to something to identify the rafts he is talking about. [76]

Mr. RUSTGARD.—I did not expect to prove by this witness anything except the true contents in board measure of the rafts in question. I will have to prove by McDonald afterwards that this particular raft which this witness testifies to now was the one delivered to Worthen.

The COURT.—The Court will insist that you put a witness on the stand first to identify the logs that he is talking about before you put this witness on as to the difference in the number of feet.

(Witness temporarily withdrawn.)

**Testimony of Gordon D. McDonald, for Defendants
(Recalled).**

GORDON D. McDONALD, recalled as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. Mr. McDonald, you are acquainted with Mr. Allen? A. Yes, sir.

Q. You have heard him testify that he scaled a certain raft in Duncan Canal on the 15th of September, 1916? A. Yes, sir.

Q. Is that the Duncan Canal raft which you have heretofore referred to and which you delivered to the Worthen Lumber Mills? A. Yes.

Mr. RUSTGARD.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Where did you deliver that raft to the Worthen Lumber Mills?

A. I delivered that raft to the Worthen Lumber Mill in Duncan Canal.

Q. That is all you know about it?

A. That is all I know—I know that.

Q. That is all you know about that being the raft that Stevenson scaled?

A. I was on the raft when it was scaled in Duncan Canal. [77]

Q. You know Allen scaled it?

A. I know Allen scaled it.

(Testimony of Gordon D. McDonald.)

Q. You don't know anything about whether that is the raft that Stevenson scaled?

A. I know nothing about it after it leaves my presence. They were to be delivered under the agreement when he hooked on to them.

The COURT.—Where were they to be delivered under your agreement?

A. They were to be accepted at the camp and they are no more our logs when he hooks on to them. That is the rule everywhere in regard to any timber—or at least it is the customary rule.

The COURT.—That being the case, the logs are delivered when the tug boat takes them—the logs are delivered down there?

Mr. RUSTGARD.—They become Worthen's property that moment.

The COURT.—Very well, proceed.

Q. You didn't come to Juneau at all and you don't know what happened here?

A. I don't know anything about it.

Q. You paid no more attention to any of these rafts after they hooked on to them? A. Nothing.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

**Testimony for James Allen, for Defendants
(Recalled).**

JAMES ALLEN, recalled as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

(Testimony of James Allen.)

Direct Examination.

(By Mr. RUSTGARD.)

Q. What system of scaling did you use?

A. The Scribner Decimal C scale rule.

Q. I ask you to look at this instrument which Stevenson testified he used—is that the same system?

A. I would have to compare it to tell you in detail.

Q. This is a Decimal C, isn't it?

A. It looks that way—I [78] couldn't swear to it only certain figures—I couldn't tell you all the way through.

Mr. RUSTGARD.—Will you concede it is a Scribner Decimal C?

Mr. WORTHEN.—I haven't been able to get a Government Decimal C to compare it with.

Mr. HELLENTHAL.—We will stipulate they are the same—there are the same figures on them.

Q. These calipers and this scale used both by Stevenson and the Government is what is known as Scribner Decimal C? A. Yes, sir.

Q. They are the scales you also used?

A. Yes, sir.

Q. Now, then, what did you find that raft from Duncan Canal to contain in board measure?

Mr. HELLENTHAL.—I object to that. He has not shown that the boom scaled by Stevenson was not the same boom that he has scaled. There is not a scintilla of evidence to show that. He simply has shown that the boom was delivered to the Worthen Mills, but he has not shown that Stevenson has scaled the boom that was delivered to the Worthen Mills

(Testimony of James Allen.)

known as the Duncan Canal boom.

The COURT.—Let me ask you, Mr. Rustgard. Do I understand you are offering this evidence for the purpose simply of showing that it could not be the same raft because according to the forestry scale there were more feet in it than the scale of the mill shows?

Mr. RUSTGARD.—Yes, but with this addition, I want to show that the difference in the scale is so great that it precludes the idea of an honest scale by Stevenson if it was the same raft. The difference both in gross scale and lineal feet is too great.

The COURT.—Very well. Now I understand just exactly what you want. All testimony on that subject, devoted to that purpose [79] is excluded. If that is the only way you propose to show it is not the same raft, by simply showing there were more feet in it according to the Government scale than there were according to the mill scale, and you say it is, it is excluded. It is not a question of how many feet—it is a question of the identity of the raft. If it is not the same raft it does not make any difference how much the forester found there was in it.

Mr. RUSTGARD.—I wish at the present time to make an offer,—and I make it in writing. I offer to prove by this witness that the raft in question contained 516,680 board feet measured after all bad logs or defective logs or defective parts of logs had been excluded from the count by the ranger.

(Offer objected to as immaterial and objection sustained by the Court.)

(Testimony of James Allen.)

Q. Mr. Allen, did you scale any raft of logs cut by Schenk and McDonald at Portage Bay on the 24th day of March, 1917?

A. I very likely did—I don't remember just the date.

Q. Will you get your records to determine?

A. Yes, sir, I did.

Mr. RUSTGARD.—Will counsel concede that that is the raft from Schenk and McDonald delivered to the Worthen Lumber Mills and which is included in the bill of particulars as raft No. 1, 1917?

Mr. HELLENTHAL.—I think so.

Q. Did you use the same system of scaling which has been testified to already? A. Yes, sir.

Q. (By Mr. HELLENTHAL.) I would like to ask you one question here—did you scale 34 foot logs as 34 feet long or as 32 feet long?

A. As 34 feet long—made two cuts of them yes.

[80]

Q. (By Mr. RUSTGARD.) Have you kept track in your records of the logs which were actually 34 feet and which you scaled as such? A. Yes, sir.

Q. And you have those records with you now?

A. They are all contained in the scale sheets.

Q. You are in position at the present time then to state how many logs in that raft were 34 feet long and scaled as such? A. Yes, sir.

Q. Have you yourself figured out the scale of those 34 foot logs in excess of 32 feet?

A. Mr. Weigle and I did.

Q. Mr. Weigle and you did together?

(Testimony of James Allen.)

A. Yes, sir.

Q. You are able then at the present time to state what that excess was? A. Yes, sir.

Q. I ask you now, Mr. Allen, to state what that raft contained in board measure excluding 2 feet on all 34 foot logs which were scaled as such?

Mr. HELLENTHAL.—I object to that as being immaterial.

The COURT.—The objection is sustained, and the objection will be sustained to all the other 8 rafts, when it comes in that way. The Court ruled that if the only object and purpose, and way, in which you propose to show that these rafts are not the rafts which were scaled is by the discrepancy in the number of feet as shown by the mill scale and as shown by the forester's scale, then the testimony, the Court rules, is incompetent and irrelevant.

Mr. RUSTGARD.—I understand the Court's position on it, and I am not asking these questions to worry the Court—I am asking them because I want to get the record in shape.

The COURT.—I know, but it takes up time, and I am telling you that I make the same ruling on all the other eight rafts. [81] You make one offer for the whole thing, and the Court will make one ruling on the whole thing—I will reject the offer—that preserves your record.

Mr. RUSTGARD.—Very well, your Honor. I offer to prove by this witness that the other nine rafts which McDonald has testified he delivered to Worthen at Portage Bay in 1917 were scaled by this

(Testimony of James Allen.)

witness as a forest ranger, scaled for the Government—I offer to prove that he scaled those 10 rafts.

The COURT.—You offer to prove that the amount of board measure and lineal feet in the rafts that were delivered to the mill was greater than shown by the mill scale? You may give the figures in each raft to the stenographer, and what you expect to prove the difference is in each raft, and that preserves your exceptions.

Mr. RUSTGARD.—The only ruling I had in mind was this, that the Court has held if you make the offer without having your witness on the stand you cannot raise it as error.

The COURT.—I do not remember any such ruling as that.

Mr. RUSTGARD.—I do. I offer to prove by this witness that on behalf of the Government, as a forest ranger, he scaled the ten rafts at Portage Bay before they were delivered to the Worthen Lumber Mills; that they are the same rafts which McDonald has testified that he, McDonald, did, at that place, deliver to the Worthen Lumber Mills, and that the scale was as follows: 281,960; 268,080; 219,220; 217,280; 230,870; 230,930; 314,970; 273,590; 273,320; 359,860; total 2,670,080, and that this is the scale after all bad logs, splits, stakes and discounts of 2 feet on each 34 foot log had been eliminated.

The COURT.—The ruling will be the same. [82]

Mr. RUSTGARD.—Before I dismiss this witness, your Honor, I wish to make the offer further to prove by other witnesses that the actual scale made by this

(Testimony of James Allen.)

witness of these rafts was a correct scale of the actual board feet contained in the rafts.

The COURT.—Very well, the ruling will be the same.

Mr. RUSTGARD.—That is all.

(Witness excused.)

Mr. RUSTGARD.—I ask if it is understood that the reason I offered the evidence was partly to show by this evidence that the scale of Mr. Stevenson was fraudulent or he had scaled the wrong booms? That is, I have assumed that that would apply to all my offers.

The COURT.—Yes, but the Court understood you to mean that the fraudulent character was to be shown by the discrepancy in the two scales? You propose to show it was fraudulent by showing a discrepancy in the two scales?

Mr. RUSTGARD.—The discrepancy between the two scales, together with the number of lineal feet in the rafts accounted for by Mr. Stevenson and accounted for by the Government.

The COURT.—Yes, I understood that—and by that alone.

Mr. RUSTGARD.—Yes, that in connection with the testimony given by Worthen and Stevenson themselves.

The COURT.—The offer is rejected.

JAMES ALLEN, recalled on behalf of the defendants, having been previously duly sworn, testified as follows:

Mr. RUSTGARD.—I offer to prove by this wit-

(Testimony of James Allen.)

ness that he scaled the rafts which McDonald has testified he delivered to the Worthen Lumber Mills at Portage Bay in May, 1916, at Malmsbury, June 26th, or in the spring of 1916, and Duncan Canal. The witness has already testified to the Duncan Canal raft, but I offer to prove that the scale of those rafts was as follows [83] after allowing for all defective logs, splits, etc., the same as the other offer: 148,60; 343,480; 397,770; 516,680; total 1,405,990.

The COURT.—Very well—the same ruling.

(Witness excused.)

Testimony of W. G. Weigle, for Defendants.

W. G. WEIGLE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. What is your full name? A. W. G. Weigle.

Q. What is your occupation?

A. Forestry supervisor.

Q. How long have you been in the Forest Service?

A. Since 1902.

Q. Before that what occupation did you follow?

A. I followed different occupations.

Q. Did you have anything before that to do with logging and sawing mills?

A. I worked in the woods more or less every year; before that worked on the farm most of the time.

Q. How long have you been in charge of the forest service at this place? A. Since 1911.

(Testimony of W. G. Weigle.)

Q. The various rangers are working under your direction? A. They are.

Q. You are stationed at Ketchikan, Alaska?

A. I am.

Q. Are you familiar with the meaning of the term "mill scale"?

Mr. HELLENTHAL.—I object to that—it is a word that does not need any explanation.

The COURT.—The objection is overruled.

A. I am familiar with it as used by the Forest Service.

Q. What is that meaning?

Q. (By Mr. HELLENTHAL.) Are you familiar with it as used by the sawmills and loggers?

A. I don't know anything [84] about how the loggers might consider that.

Q. (By Mr. HELLENTHAL.) Or the sawmills?

A. It is simply a professional term in our bulletins, etc.

Mr. HELLENTHAL.—Then I object to it as immaterial. The sort of a mill scale that the Forestry Service might use would mean nothing.

The COURT.—I think the question should be confined to what it means as between loggers and millmen.

Q. I will ask you a little more, Mr. Weigle. The term mill scale, is it frequently used in the Forestry Department? A. It is.

Q. And used in your literature?

A. Yes, sir.

Q. In reference to the business of the Forestry

(Testimony of W. G. Weigle.)

Bureau? A. Yes, sir.

Q. In that connection I ask you what does the term "mill scale" import?

Mr. HELLENTHAL.—I object to that as being immaterial because what it means to the Forestry Department is not the question before the Court. It is what it means to the lumber-man and the saw-millman.

The COURT.—The objection is sustained.

The WITNESS.—We also have a dictionary of forest terms—it is in that.

Q. You have issued a dictionary of forest terms?

A. Yes, sir.

Q. And the word is included therein?

A. Yes, sir.

Q. And defined therein? A. Yes, sir.

Q. The definition given there, is that the definition which it is accepted at by the Forestry Bureau?

A. Yes, sir.

Q. What is that definition?

Mr. HELLENTHAL.—I make the same objection.

The COURT.—The objection is sustained, unless this witness knows what it means in the usual acception of the term between [85] millmen and loggers. Within those limits I will allow testimony, but I cannot allow testimony as to what it means in relation to a matter that is not before the Court.

Mr. RUSTGARD.—I offer to prove by this witness that the term "mill scale" as used by the Forestry Service as he has testified is as follows: "The tally of the lumber after the logs are run through

(Testimony of G. D. McDonald.)

the mill, tally behind the saw.”

Mr. HELLENTHAL.—I object to that.

The COURT.—Objection sustained.

(Witness excused.)

**Testimony of G. D. McDonald, in His Own Behalf
(Recalled—Cross-examination).**

G. D. McDONALD, one of the defendants herein, upon being recalled for cross-examination, having been previously duly sworn, testified as follows:

Cross-examination.

(By Mr. HELLENTHAL.)

Q. I hand you a letter dated February 21, 1916, that was shortly before that towing was done, was it not—is that letter written by you and signed by you?

A. I don't know; some of it is written in pencil, and some of these words are somewhat blotted.

Q. Is that your signature?

A. It is from what I know at the present time, yes.

Q. Written on your letter-head?

A. Yes, it is written on our letter-head.

Q. And your handwriting?

A. It appears to be.

Q. I offer that in connection with the cross-examination of this witness.

Mr. RUSTGARD.—No objection.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit "S," and copy hereto attached.) [86]

Q. Were you present at the time the boom was

(Testimony of G. D. McDonald.)

made up at Duncan Canal when it had gone to pieces?

A. Yes, sir, I was there myself.

Q. You kept actual tally of that time?

A. Yes.

Q. And the number of men there?

A. Yes, sir.

Q. You testified of your own knowledge in that regard? A. Yes.

Mr. RUSTGARD (to Mr. Worthen).—I was going to inquire from you in regard to your testimony. I think it was to the effect that in 1917 you were short of logs, and you sawed them up just as fast as you got them. That was your testimony, wasn't it?

Mr. WORTHEN.—I don't recall being asked that, but that was pretty nearly the fact.

(Questions by the COURT.)

Q. Where are all these logs now?

A. Cut up and distributed.

Q. When were they cut up? A. Last summer.

Q. The last boom under the 1917 contract was scaled July 15th, was it not?

A. I think something like that.

Q. Now, when was the timber sawed into lumber—when did it go through the mill?

A. You mean the exact date?

Q. No, approximately. What was the custom when logs would come in?

A. It depends on how many we have on hand. If we have a lot of logs we take them up into the upper bay—

Q. What is the average—

(Testimony of G. D. McDonald.)

A. The average—sometimes it is a week; sometimes it is six months.

Q. Have you no recollection about these logs?

A. I think these logs were finally all sawed up before the first of September.

Q. Have you no recollection as to when you received the last raft on July 15th what had become of the logs before that? [87]

A. With the exception of that one boom they had been sawed up during the summer; we had one boom up on the tide flats at Price's Point.

The COURT.—That is all.

(Witness excused.) [88]

Testimony of Allen Fortney, for Plaintiff.

ALLEN FORTNEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. What is your name? A. Allen Fortney.

Q. Do you know Mr. Stevenson? A. Yes, sir.

Q. Did you ever work in connection with Mr. Stevenson scaling logs? A. Yes, sir.

Q. I hand you here a scale-book, which scale-book contains some exhibits introduced in this case, and ask you whose writing that is.

A. That is my writing.

Q. Did you correctly put down the figures as they were given to you by Mr. Stevenson?

A. Yes, sir.

(Testimony of Allen Fortney.)

Q. And you know that your figures contained in that book are accurate, as Mr. Stevenson gave them to you? A. Yes, sir.

Cross-examination.

(By Mr. RUSTGARD.)

Q. How old are you, Allen? A. 17.

Q. What grade are you in in school?

A. Eighth grade.

Q. How many rafts did you help Stevenson to scale?

A. I don't know—I couldn't answer that question.

Q. Is all the writing in that book your handwriting? A. Not all of it.

Q. How much of it—approximately half of it?

A. I couldn't say.

Q. Just look at it please and tell us approximately how much of that book is in your handwriting.

Mr. HELLENTHAL.—It is clearly distinguishable which is and which is not.

Q. Is the writing on page 10 your writing?

A. No, sir.

Q. Is the writing on page 18 your writing?

A. No, sir.

Q. Is the writing on page 26 your writing?

A. Some of it.

Q. Whose is the other? A. This here? [89]

Q. Yes. A. Mr. Stevenson's.

Q. Which is Stevenson's and which is yours?

A. This is Mr. Stevenson's and this is mine (indicating).

(Testimony of Allen Fortney.)

Q. Part of the first column is Stevenson's and part of the third and fourth columns is yours?

A. This here is Mr. Stevenson's; I started in here.

Q. Then about two-thirds of the first two columns to the left is Stevenson's handwriting, and the rest of it is yours, on that page? A. Yes, sir.

Q. How is 38—is that yours? A. Yes, sir.

Q. How about 44? A. That is mine.

Q. Those crosses in front of some of the figures, are they yours? A. Yes, sir.

Q. What do they stand for?

A. Stand for a single log.

Q. What are these brackets?

A. Stands for one log cut into two parts.

Q. I call your attention to the figures in the third column from the left,—I call your attention particularly to page 38—that is your handwriting on page 38? A. Yes, sir.

Q. Those figures in the third column from the left, did you put them down? A. Yes, sir.

Q. What time did you put those down? At the time you were scaling? A. Yes, sir.

Q. Do you know what they stand for?

A. This here one stands for—S, split, and 4 stands for $\frac{1}{4}$ — $\frac{1}{4}$ was split.

The case was then argued to the jury after which the Court instructed the jury as follows: [90]

Instructions of Court to Jury.

GENTLEMEN OF THE JURY:

(1)

If everybody in this world knew exactly what he

was entitled to and did not want any more than what he is entitled to, and if everybody in this world knew just what he owed and was willing to pay every cent he owed and to fulfill every other obligation, there would be no use for courts nor juries nor lawyers—the world would be a pretty nice place to live in; but it is because some people do not always know just what they are entitled to, and sometimes because although they know it, yet they want more than they are entitled to; and it is because some people do not always know just what they owe and at other times although they know what they owe, yet they do not want to pay the full amount they owe, that courts are set up and juries and lawyers come into existence.

In setting up courts the State has determined that on all questions of fact the jury are the judges; it has also determined that the question as to what shall go to a jury the Judge shall determine. That may not be wise, but that is our system of jurisprudence. Nine times out of ten whatever the jury decides as to the facts, the losing party considers that he has gotten the worst of it, and quite often that he has gotten the worst of it through some ignorance or dishonesty; the same with the Court and the Judge—no matter what the Judge decides as to the law, the losing party quite often considers that he has gotten the worst of it through the ignorance or dishonesty of the Court; but if the jury is composed of men of average common sense and experience, and the court is composed of a Judge or Judges of average common sense and experience, neither the Court nor the jury

will pay the slightest attention to any such idea that may be in the mind of the losing party—just simply expects it and puts it down, as one of the incidents of the life of a man who has anything to decide affecting the rights of other people. [91]

It is under this scheme of jurisprudence that the Court has to tell the jury what there is before it to decide. Sometimes the Court tells the jury that under the evidence in the case there is nothing for them to decide—takes the case entirely away from the jury, because under the law and the evidence there is nothing for the jury to decide. In other cases the Court narrows the issues down from the evidence and submits to the jury what is to be decided under the evidence and the law in the case.

I am saying this to you, gentlemen, simply to impress upon you the high nature of your duties and of mine—and of how we must hew to the line, you performing your functions and I mine, without fear of criticism or hope of commendation.

(2)

Now, this case has become narrowed in the issues that are to be submitted to this jury,—narrowed by the pleadings and the evidence—more by the evidence than by the pleadings. The pleadings are the papers on which the suit is founded, the complaint, answer and reply that are made—they are called the pleadings in the case. The evidence you have heard before you,—the pleadings you take with you to the jury-room. The complaint in this case is to be taken in connection with the bill of particulars that has been called for by the defendant and furnished by

the plaintiff, and filed in the case. The complaint, then, is not only the original complaint, but the complaint as amplified by the bill of particulars which will be submitted to you along with the complaint.

(3)

Now, this is a suit, in its form, on an open account—the evidence in the case shows that it is not strictly an open account, but that the indebtedness divides itself into two periods [92] of time covered by two alleged contracts, respectively, according to the plaintiff's presentation of the case.

(4)

What was due under the first contract? Plaintiff claims a certain amount of money due to him under a contract dated March 27, 1916 (which is Plaintiff's Exhibit "A"), and the evidence shows that plaintiff claims that there is a certain other sum due to him under and by virtue of the contract of March 4, 1917 (Plaintiff's Exhibit "B"). The defendant by his testimony contends that this contract of March 27, 1916, was never in force, that nothing was done under it. Now, whether anything was done under it or not is absolutely immaterial in this case for the reason that the plaintiff, by his bill of particulars, shows that there is nothing due under that contract. I am talking now, when I say nothing due under the contract and that it is absolutely immaterial in the case, about the question of how much timber was delivered under the contract and the amount due thereunder. I say that has nothing to do with the case now because the bill of particulars shows that whatever logs were delivered

under that contract have been fully paid for, with the exception of \$74.42; consequently there is nothing coming to the Worthen Company, the plaintiff, for logs delivered under the first contract. On the contrary, there is \$74.42 due to Schenk and McDonald, the defendants, under that first contract. In other words, there can be no claim against Schenk and McDonald under the first contract, whether anything was or was not done under it.

(5)

Now, we come to the second contract. That contract is admitted in the evidence in the case. It is admitted that that contract was entered into and that logs were delivered thereunder. [93] That being the case you will determine from the evidence the number of thousand feet of lumber that were delivered under the contract—calculate it according to the mill scale—take the mill figures for it—and you will multiply that sum by \$6.50 (a thousand). Then you will ascertain from the evidence what amount has been paid and advanced by plaintiff for and on account of that contract. Now, the remainder would be the sum due to plaintiff if the defendant has not established any defense or counterclaim. Well, the defendants do set up some defenses and counterclaims. They set up as a first counterclaim that they had a contract with plaintiff under which they claim they delivered some logs and that there is money due them thereunder. There is no evidence of any contract for the delivery of logs as set up in this first counterclaim; consequently that counterclaim is entirely withdrawn from your consideration.

(6)

The defendant sets up a second counterclaim. The second counterclaim reads as follows: "that on and between June 24, 1916, and the 16th day of September, 1916, defendants furnished to plaintiff at the latter's instance and request the use of a tow-boat with a crew, for periods aggregating 172 hours; that the same was actually and reasonably worth the sum of \$5 per hour, totaling \$860.00."

Now, plaintiff says that so far as that job of towing is concerned, the agreement was that the defendants would charge simply the actual cost of it. Now, it is for you to determine what the agreement was as to that job of towing—whether it was to be paid for at its reasonable worth and value as things go, the going price of things in the market and customs of men engaged in that class of business—or whether it was to be the [94] actual cost. If you decide that plaintiff agreed to pay just simply the cost, why then you will determine what the cost was and allow that as a deduction from whatever sum you may find to be due to plaintiff under this second contract; but if you find that the contract was for reasonable worth and value of those services, then you determine what the reasonable worth and value of those services was and deduct that sum. That is a matter entirely for you to determine from the evidence in the case. If you find it was to be the reasonable worth and value, you should find from the evidence how many hours were occupied in said job, and what is the reasonable worth and value per hour.

(7)

You will find set up in the answer a third counterclaim which is a counterclaim similar to the first counterclaim, and the Court gives you the same instruction as to that counterclaim that it gave you as to the first counterclaim—that is to say, there is no evidence whatsoever to support it, and the said counterclaim is entirely withdrawn from your consideration.

(8)

Then the defendant sets up another counterclaim and that is known as the fourth counterclaim, which reads as follows: "That during the month of July and August, 1917, defendants loaned to plaintiff 72 boom chains and 3 piling chains which plaintiff agreed either to return to defendants or pay for at their value. That plaintiff has neglected and refused to return the said chains and that the actual and reasonable value of said boom chains is \$3 for each or the total of \$216, and the value of the said piling chains is \$7.50 for each, or the total of \$22.50."

Now, you are to consider whether or not there are any boom chains or piling chains that plaintiff owes the defendant for by virtue of the fact that plaintiff did not return them or [95] did not pay for them. If so, determine from your recollection of the evidence how many boom chains and how many piling chains, and allow defendants such sum as you may find is the reasonable worth and value of same, and deduct that sum also from whatever sum you may find is due the plaintiff under this second contract.

(9)

Then the defendant has set forth another counterclaim known as the fifth counterclaim, which is as follows: "That on the 15th day of September, A. D. 1916, at plaintiff's special instance and request and for its benefit, defendants furnished six workmen for re-booming a raft of logs at Duncan Canal, Alaska, which work continued for a period of nine hours, making a total of fifty-four hours. That the same was actually and reasonably worth and of the value of 50 cents per hour or a total of \$27, and that no part of the same has ever been paid." It is for you to determine whether or not such services were rendered, and if so what the value was, and if in your opinion of the evidence they were rendered and have not been paid for it is a legitimate charge against the plaintiff and should also be deducted.

(10)

In other words, gentlemen, the credits that should be made to the defendant in this case—credits, I mean, to be made on the balance due under second contract—are, 1st, the \$74.42 that he has not been paid under that first contract; 2d, the towing-boat and crew charges, if you find that anything is due under that; 3d, the boom chains and piling chain charges, if you find anything is due under that; 4th, the amount, if any, that is due for the workmen, as set forth in the fifth counterclaim.

(11)

Your verdict will have to be for the plaintiff, because by [96] a simple matter of calculation you can see that those sums, no matter what is allowed,

would not be sufficient to overcome the difference between the amounts advanced and paid by Worthen under the second contract and the value of the logs furnished by defendants, according to the mill scale.

(12)

Now, I am going to ask you to answer some questions so that if there should be any error of law in this case the Court may, if possible, know just where it is and how it affects the case. The questions I want you to answer are as follows:

Question No. 1. What sum, if any, do you find should be allowed to the credit of defendant for and on account of the use of the towboat and crew mentioned in the second counterclaim set up by defendant in the answer?

Question No. 2. What sum, if any, do you find should be allowed to the credit of defendant for and on account of the boom chains and piling chains mentioned in the fourth counterclaim set up by defendant in the answer?

Question No. 3. What sum, if any, do you find should be allowed to credit of defendant for the six workmen mentioned in the fifth counterclaim set up by defendant in the answer?

And the general verdict—"We, the jury, duly empanelled and sworn in the above-entitled cause, find for the plaintiff, and assess its recovery at" whatever sum you may find is due.

(13)

Gentlemen of the Jury, the Court has not meant by anything that has been said or has appeared in this case to influence your verdict in any way whatso-

ever, nor should you consider anything in the nature of a rebuke to any of the counsel or parties to the suit as at all affecting its merits. This is a lawsuit between [97] two citizens, each contending for what he considers is his rights, and you should decide it without fear or favor to either side. You are trying a lawsuit between these two citizens, the rights or wrongs of whose position are determined by the law and by the evidence produced upon the witness-stand.

You are the sole judges of the credibility of the witnesses and the weight of the testimony, and neither the opinion of the Court, nor counsel, nor anyone else should have any influence whatsoever in your deliberations unless it concurs with your own unbiased opinion. You are to decide the case according to the evidence as produced upon the witness-stand under the instructions of the Court as to the issues. Statements of counsel are not evidence. It is meet and proper that counsel should argue the case before you and give you their views of the evidence and of the conclusions which they think are warranted from that evidence, but in the last analysis it is your recollection of what the testimony was, and it is your judgment of what conclusions and inferences ought to be drawn from that testimony, that must govern. In this sphere you are entirely independent of the opinion of any man.

You make up your minds which witnesses are to be believed when they testify in court much the same as you do when they tell you a story outside of court—you size up the witness—you observe his appearance and demeanor—you consider the intelli-

gence of the witness, and his opportunity to know of the truth of things testified to—you note whether or not the witness is fair and frank and straightforward, or weak, shuffling and evasive—whether a disposition has been shown to tell the truth and the whole truth about the matters to which the witness testified—you consider the reasonableness or unreasonableness of the [98] testimony—you consider how the witness stood cross-examination; you consider what interest the witness has in the story told and whether or not that interest has colored the testimony, and if so, to what extent; and from all of the facts and circumstances appearing in the case make up your minds whom to believe. You would not magnify trifles nor minimize things of importance, but should accord to each piece of evidence the importance which you think it deserves in the scheme of events you are considering. If you believe that any witness has wilfully testified falsely as to any material issue or matter in relation to this case you are at liberty to disregard that witness' entire testimony except insofar as it may be corroborated by other witnesses or circumstances which you do believe.

Exceptions of Defendant to Instructions of Court to Jury.

And thereupon and before the jury retired the defendant excepted to the Court's instructions as follows:

Mr. RUSTGARD.—I except to this portion of the Court's instructions "whether anything was done under it," referring to the contract of March 27th,

1916, "or not is absolutely immaterial in this case." I also take exception to the following portion of the Court's instructions, "it is absolutely immaterial in the case about the question of how much timber was delivered under the contract and the due thereunder," referring to the contract of March 27, 1916.

I also except to the following portion of the Court's instructions: "I say that has nothing to do with the case now because the bill of particulars shows that whatever logs were delivered under that contract have been fully paid for, with the exception of \$74.42." [99]

I especially make these exceptions because there is evidence in the case tending to show that the payments which were made during the year 1916 by plaintiff to defendant were made upon a different transaction from the one testified to by plaintiff's witnesses.

I also except to the following portion of the Court's instructions: "Now, we come to the second contract. That contract is admitted in the evidence in the case. It is admitted that that contract was entered into and that logs were delivered thereunder. That being the case you will determine from the evidence the number of thousand feet of lumber that were delivered under the contract—calculate it according to the mill scale—take the mill figures for it." My exception is based upon the fact that there is nothing in the evidence to show what is meant by the term "mill scale," but the evidence shows the term mill scale is indefinite and uncertain, and has no definite or certain meaning.

I also except to the following portion of the Court's instructions: "There is no evidence of any contract for the delivery of logs as set up in this first counterclaim; consequently that counterclaim is entirely withdrawn from your consideration."

I also except to all of section 7 of the Court's instructions.

The jury thereupon retired for deliberation and subsequently returned with their verdict and special findings as filed. After the judgment had been filed the following proceedings with reference to taxation of costs were had:

On March 25th after entry of judgment plaintiff filed his bill of costs as of record. On April 1st objection was filed to bill of cost by defendant as shown by the records. On April 2d the United States Marshal filed additional certificate of costs, in words and figures as follows, to wit: [100]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

SCHENK & McDONALD,

Defendants.

Certificate of U. S. Marshal Re Costs.

THIS IS TO CERTIFY that the plaintiff paid the United States Marshal's Office as costs in the above-entitled case, accruing up to date of judgment,

without any reference to costs accruing since that date, the sum of Ten Hundred Sixty-six and 17/100 Dollars (\$1066.17) expended in connection with care and custody of attached property and other Marshal's fees in connection with this case, prior to the date of the judgment, as follows:

Marshal's expenses in serving Writ of Attachment	\$96.17
Keeper's fee	970.00

Dated at Juneau, Alaska, April 2, 1918.

For U. S. Marshal,

W. W. CASEY, Jr.,
Chief Deputy.

That prior to the filing of the certificate last above quoted there were no certificates of marshal's fees, expenses or other costs filed except the certificates attached to the summons and the writ of attachment respectively, which certificates were in words and figures as follows, to wit:

United States of America,
Territory of Alaska,
Division Number One,—ss.

I HEREBY CERTIFY that I served the within sumons on the 6th day of September, 1917, at Juneau, Alaska, and that I served the same on the 7th day of September at Petersberg, Alaska, by handing to and leaving with the within-named defendants, Gordon D. McDonald and [101] Edward Schenk, as individuals, a certified copy of the original writ herein, together with the complaint in the within entitled action, and I also certify that I served a certified copy of the original writ, together with the

complaint in the within entitled action on Edward Schenk for service on the copartnership of Schenk & McDonald, said service made personally.

Marshal's fee, \$9.00.

Paid by S. Hellenthal, Atty.

Dated at Juneau, Alaska, September 18, 1917.

J. M. TANNER,
U. S. Marshal.

By J. L. Manning,
Office Deputy.

United States of America,
Territory of Alaska,
Division Number One,—ss.

I HEREBY CERTIFY that I received the within writ of attachment on the 6th day of September, 1917, at Juneau, Alaska, and that I served the same on the 7th day of September, 1917, at Portage Bay, Alaska, by levying on a certain boom of logs, said boom of logs containing 181 pieces and which was scaled by Forest Ranger James Allen on September 6, 1917, and said to contain 394,650 feet and further certify that I did take possession of same and place a keeper in charge of said logs.

Marshal's fee \$3.00

Expenses 87.16

Paid by S. Hellenthal, Attorney.

Dated at Juneau, Alaska, September 19, 1917.

J. M. TANNER,
Marshal.

By J. L. Manning,
Office Deputy. [102]

Filed in District Court, District of Alaska, First Division, September 21, 1917. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

That thereafter on the 2d day of April, 1918, the clerk overruled defendant's objection to the cost bill and taxed the cost as demanded by plaintiff and in making such taxation allowed marshal's fees at \$1,066.17. That thereafter and on the 3d day of April, 1918, defendant appealed to the District Court from the clerk's allowance and taxation of costs as of record; that said appeal was thereafter and on the 3d day of April, 1918, submitted to the District Court of the Territory of Alaska, First Division; that thereafter and on the 4th day of April, 1918, the Judge of said District Court instructed plaintiff to file a certified statement of the marshal's fees taxed by the clerk and serve a copy thereof on attorney for defendant, which order was oral and not reduced to writing but was subsequently and on the 4th day of April complied with; that thereafter the said District Court, after hearing counsel for both plaintiff and defendant, affirmed the taxation of cost made by the clerk of court and the allowance of the marshal's fee at \$1,066.17. [103]

Plaintiff's Exhibit "A"—Log Contract, March 27, 1916, Between Gordon McDonald and Worthen Lumber Mills.

LOG CONTRACT.

THIS AGREEMENT made and entered into this 27th day of March, 1916, by and between Gordon McDonald, party of the first part, and Worthen Lum-

ber Mills, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, WITNESSETH:

That the said party of the first part for and in consideration of the sum of One Dollar to him in hand paid by the party of the second part and the further considerations hereinafter specified, agrees to furnish and deliver to the said party of the second part at time and place as hereinafter specified One Million, more or less feet of first-class merchantable logs, spruce and cedar. Said logs shall be sound and straight grained, free from doty spots and dry rot, wind and heart shakes and checks, and shall be smooth trimmed. They shall not exceed sixty inches in diameter at the large end. They shall be safely and securely boomed with good chains and swiftners and the booms shall be in sections of not to exceed One Hundred Thousand Feet in each Section, and the width of the boom not to exceed Thirty-five Feet. The said logs shall be scaled by the Scribner log rule and the said first party agrees to accept the mill scale. The said logs shall be cut at North end Prince of Wales Island, Alaska under the terms and conditions required by the Forest Reserve regulations, and shall be placed in the waters of the sea, in the inlet or bay contiguous to the place where cut, in a safe and accessible place for the tugboat to reach when ready to tow, said place not to exceed 175 miles distant from the mill at Juneau of said company by the ordinary route of water travel.

IT IS FURTHER AGREED that the price to be paid for said logs shall be Six Dollars (\$6.00) per

thousand feet, free of all taxes and stumpage, which are to be paid *by the first part*, payable at the mill of said second party, the towing of said logs to be by and at the cost of the said second party. The said second party agrees to advance the money required for stumpage, which [104] amount so advanced shall be a lien on said logs, and shall be deducted from the purchase price of said logs.

IT IS FURTHER EXPRESSLY AGREED that said second party shall have a lien on all logs cut by the party of the first part for any and all sums, goods or merchandise advanced said first party for the carrying out on his part of this contract, or otherwise advanced.

In settlement for any boom of logs, or any logs furnished by said party of the first part under this contract, or any logs sold by said first party to said second party, the amount of any and all advances made by the party of the second part to the party of the first part, or for his account, shall first be deducted; and in case the party of the first part fails to deliver and furnish sufficient logs to repay such advances the party of the first part hereby agrees to pay to said party of the second part the amount due and owing by reason of such advances. This contract is not assignable by either party.

IT IS FURTHER AGREED that said logs shall be cut, properly boomed and lodged in a safe and secure but accessible place and ready for towing as follows: as soon as possible but not later than Sept. 1st, 1916. Each boom of logs shall be scaled by the

party of the first part and this scale shall be sent to party of the second part for purpose of comparison with number of pieces in boom: and said logs shall be considered delivered when, and in such amounts as, taken in tow by the tugboat of the said second party.

And the first party agrees to notify the party of the second part at its place of business in Juneau when any boom is ready for towing.

AND IT IS FURTHER AGREED that in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties. It is further agreed that party of the first part shall furnish a boat of at least 50 horse power to assist in towing said logs as far as Petersburg, Alaska, cost of said assistance included in above price of logs.

IN WITNESS WHEREOF we have hereunto set our hands and seals the day and year above written at Juneau, District of Alaska.

SCHENK McDONALD LOG CO.

(Signed) By G. D. McDONALD,

Mgr. [105]

Plaintiff's Exhibit "D"—Log Contract, January 4, 1917, Between Edward Schenk and Gordon D. McDonald, Copartners, and Worthen Lumber Mills.

LOG CONTRACT.

This agreement, made and entered into this 4 day of January, 1917, by and between Edward Schenk and Gordon D. McDonald, co-partners party of the

first part, and Worthen Lumber Mills, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, WITNESSETH:

That the said party of the first part for and in consideration of the sum of One Dollar to him in hand paid by the party of the second part and the further considerations hereinafter specified, agrees to furnish and deliver to the said party of the second part at time and place as hereinafter specified three million feet board measure, more or less—feet of first class merchantable logs, spruce, and cedar. Said logs shall be sound and straight grained, free from doty spots and dry rot, wind and heart shakes and checks, and shall be smooth trimmed. They shall not exceed sixty inches in diameter at the large end. They shall be safely and securely boomed with good chains and swifters and the booms shall be in sections of not to exceed One Hundred Thousand Feet in each Section, and the width of the boom not to exceed sixty Feet. The said logs shall be scaled by the Scribner log rule and the said first party agrees to accept the mill scale. The said logs shall be cut at Portage Bay, Kuprenoff Island, Alaska under the terms and conditions required by the Forest Reserve regulations, and shall be placed in the waters of the sea, in the inlet or bay contiguous to the place where cut, in a safe and accessible place for the tugboat to reach when ready to tow, said place not to exceed 110 miles distant from the mill at Juneau of the said company by the ordinary route of water travel.

IT IS FURTHER AGREED that the price to be paid for said logs shall be Six & 50/100 Dollars (\$6.50) per thousand feet, free [106] of all taxes and stumpage, which are to be paid by the first party, payable at the mill of said second party, the towing of said logs to be by and at the cost of said second party. The said second party agrees to advance the money required for stumpage, which amount so advanced shall be a lien on said logs, and shall be deducted from the purchase price of said logs.

IT IS FURTHER EXPRESSLY AGREED that said second party shall have a lien on all logs cut by the party of the first part for any and all sums, goods or merchandise advanced said first party for the carrying out on his part of this contract, or otherwise advanced.

In settlement for any boom of logs, or any logs furnished by said party of the first part under this contract, or any logs sold by said first party to said second party, the amount of any and all advances made by the party of the second part to the party of the first part, or for his account, shall first be deducted; and in case the party of the first part fails to deliver and furnish sufficient logs to repay such advances the party of the first part hereby agrees to pay to said party of the second part the amount due and owing by reason of such advances.

IT IS FURTHER AGREED that said logs shall be cut, properly boomed and lodged in a safe and secure but accessible place and ready for towing as follows: First Boom by March 1st, 1917, last boom

by the first day of July, 1917, Booms to contain not over 350,000 nor less than 250,000 each and it is agreed that the party of the first part will not sell or deliver any logs from said bay to any person or corporation except the second party.

And said logs shall be considered delivered when, and in such amounts as, taken in tow by the tug-boat of said second party.

And the first party agrees to notify the party of the second part at its place of business in Juneau when any boom is ready for towing.

AND IT IS FURTHER AGREED that in case of dispute over scale the scale of a competent, disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery 34 ft. logs shall be scaled as 32 ft. long.

In Witness Whereof we have hereunto set our hands and seals the day and year above written at Juneau, District of Alaska.

EDWARD SCHENK and
GORDON D. McDONALD.

By G. D. McDONALD.

WORTHEN LUMBER MILLS.

H. S. WORTHEN,

Treas. [107]

(In exhibits "A" and "D" the parts underscored are in typewriting, the remainder is printed, except the signatures, which are in writing.) [108]

**Plaintiff's Exhibit "S"—Letter, February 21, 1916,
Schenck & McDonald Log Co. to Worthen
Lumber Mills.**

(Letterhead, Schenk-McDonald Logging Company.)
February 21, 1916.

Worthen Lumber Mills,
Juneau, Alaska.

Mr. Worthen, Dear Sir:

Your letter of February 4 at hand and will say that we will be willing to meet you half way on any proposition you want to take up on getting logs on Kenai Island but will have to move quick as Mr. George E. James is looking for timber in that location. We have several bunches of timber in sight down there and if you can use it we will make the use of our new tug boat to you for just what it costs to operate it. I think that is very fair, she is about the same power as your own boat and as to the booms we will make them any way you want them made up, any width or any length. We will expect you to advance the stumpage. This timber is the best I know of anywhere and if you want it you will have to hurry to beat the other party.

Let me know by return mail and I will apply for the sale.

Yours truly,

SCHENCK McDONALD LOG COMPANY.

By G. D. McDONALD,

Manager. [109]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK and McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GORDON
D. McDONALD, and EDWARD SCHENK
and GORDON D. McDONALD, as Indi-
viduals,

Defendants.

Order Settling and Approving Bill of Exceptions.

The foregoing and hereto attached bill of excep-
tions has been examined by me and found to be full,
true and correct and to contain all the evidence ad-
duced and proceedings had at the trial of the above-
entitled cause except, however, such evidence as re-
lates solely to the second, fourth and fifth counter-
claim of defendants, and it also contains a true and
correct statement of the proceedings had in this court
touching the taxation of costs, and it is hereby settled,
signed and filed as the bill of exceptions in the above-
entitled cause.

Done in open court this 10th day of June, 1918.

ROBERT W. JENNINGS,

District Judge.

Filed in the District Court, District of Alaska, One
Division. Jun. 10, 1918. J. W. Bell, Clerk. By
_____, Deputy. [110]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GORDON
D. McDONALD and EDWARD SCHENK
and GORDON D. McDONALD, as Indi-
viduals,

Defendants.

Verdict.

We, the jury duly impaneled and sworn in the
above-entitled cause, find for the plaintiff, and assess
its recovery at \$839.53/100.

JOHN McLOUGHLIN,
Foreman.

Entered Court Journal No. O, page 98.

Filed in the District Court, District of Alaska,
First Division. Mar. 18, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [111]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Case No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership, Com-
posed of EDWARD SCHENK and GORDON
D. McDONALD, and EDWARD SCHENK
and GORDON D. McDONALD, as Indi-
viduals.

Defendants.

Judgment.

This matter came on regularly for hearing on March 15th, 1918, the plaintiff appearing by its attorneys, Hellenthal & Hellenthal, and the defendants by their attorney, John Rustgard, Esquire, a jury of twelve persons having been regularly impaneled and sworn to try said action, the parties having presented witnesses and offered testimony, and both parties having introduced all of their testimony and having rested, respective counsel having addressed arguments to the jury, and the Court having instructed the jury; whereupon the jury retired to consider their verdict. And subsequently, on March 18, 1918, returned into court with a verdict signed by its foreman, John McLoughlin, all of said jury having answered to their names and said, after hearing said verdict read, that it was their verdict, which said verdict is in words and figures as follows: [112]

*“In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership, Com-
posed of EDWARD SCHENK and GORDAN
D. McDONALD, and EDWARD SCHENK
and GORDAN D. McDONALD, as Indi-
viduals,

Defendants.

VERDICT.

The jury duly impaneled and sworn in the above-entitled cause find for the plaintiff, and assesses its recovery at \$838.53/100.

(Signed) JOHN McLOUGHLIN,
Foreman.

Entered Court Journal No. O, page 98. Filed March 18, 1918.”

And more than three days having expired since giving of said verdict, and no motion for new trial or in arrest of judgment having been filed, and it further appearing to the Court that personal property, consisting of a boom of logs situate at Portage Bay, Kupreanof Island has been attached in this action and has not been sold as perishable property or discharged from the attachment as provided by law;

IT IS ORDERED AND ADJUDGED that the plaintiff, the Worthen Lumber Mills, a corporation, have and recover from said defendants, Schenk & McDonald, a copartnership composed of Edward Schenk and Gordan D. McDonald, and Edward Schenk and Gordan D. McDonald as individuals, the sum of \$838.53 and the plaintiff's costs and disbursements incurred in this action, in the sum of \$—, taxed by the clerk.

And the Court FURTHER ORDERS AND ADJUDGES that said boom of logs attached in this action, now lying and being at Portage Bay, Kupreanof Island, Alaska, be sold as provided by law to satisfy plaintiff's [113] demands, consisting of the amounts specified herein: Defendant allowed 30 days within which to file proposed bill of exceptions.

Done in open court this 25th day of March, A. D. 1918.

ROBERT W. JENNINGS,
Judge.

Copy received this 23d day of March, 1918.

JOHN RUSTGARD,
Attorney for Defendants.

Entered Court Journal No. O, pages 117, 118.

Filed in the District Court, District of Alaska, First Division. Mar. 25, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [114]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK and McDONALD, a Copartnership,
Defendants.

Objections to Cost Bill.

To the Clerk of the Above-named Court:

Please take notice that the defendants object to and protest against that item in plaintiff's cost bill designated "Marshal's Fees \$1,066.17," for the reason that there is nothing of record to show that the marshal's fees are in *access* \$99.16, and defendants therefore object to the taxation of more than \$99.16 for such fees.

JOHN RUSTGARD,
Attorney for Defendants.

Filed in the District Court, District of Alaska,
First Division. Apr. 1, 1918. J. W. Bell, Clerk.
By _____, Deputy. [115]

*In the District Court of the United States for the
District of Alaska, Division No. 1.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership, etc.,
Defendant.

Cost Bill.

Statement of disbursements claimed in the above-entitled cause, viz.:

Clerk's Fees	\$	12.00
Marshal's Fees		1,066.17
Trial Fee		12.00
Costs in Lower Court.....		
Advertising		
Depositions		
Attorney's Fees		20.00
Attorney's Fee for taking — depositions, at — each.....		
Master's Fees		
Referee's Fee		
Disbursements		
Witness Fees:		
John Stevenson Mch. 15-16-18..		9.00
Allen Fortney “ 16..		3.00
Robt. Kennedy 16..		3.00
Mat. Noedness 18..		3.00
Total.....	\$	1,128.17/100

Filed in the District Court, District of Alaska,
First Division. Mar. 25, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [116]

United States of America,
Territory of Alaska,
Division No. 1,—ss.

I, Simon Hellenthal, being duly sworn, say I am
the attorney for plaintiff in the above-entitled cause;
that the costs and disbursements set forth above have
been necessarily incurred in the prosecution of this
suit, and that plaintiff is entitled to recover the same
from the defendants.

SIMON HELLENTHAL.

Subscribed and sworn to before me, this 25th Mch.,
1918.

[Court Seal] C. Z. DENNY,
Deputy Clerk of District Court, Dist. of Alaska,
Division No. 1.

Costs taxed at \$1,128.17 this 2d day of April, 1918.

J. W. BELL,
Clerk.

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK and McDONALD, a Partnership,
Defendants.

Notice of Appeal from Taxation of Costs.

To the Above-named Plaintiff and Its Attorneys,
Hellenthal & Hellenthal.

Take notice that the defendants appeal to the Court from the decision of the clerk of court taxing as costs the sum of \$1,066.17 for marshal's fees, and from the taxing as costs any sum for marshal's fees in *access* of \$99.16.

JOHN RUSTGARD,

Attorney for Defendant.

Copy of the foregoing notice received this 3d day of April, 1918.

J. A. HELLENTHAL,

Atty. for Plff.

Filed in the District Court, District of Alaska, First Division. Apr. 3, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [117]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD, and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Defendants.

Order Affirming Taxation of Costs by Clerk.

This matter coming on to be heard upon an appeal on the part of the defendants from an order of the clerk taxing the costs that had accrued up to the date of the judgment at \$1,066.17, and the plaintiff having filed and presented to the Court an itemized statement, duly certified to by the United States Marshal, of the amount of all the costs of the U. S. Marshal so taxed, which said statement had been previously served on counsel for the defendant, and both parties being present by counsel and no objection being made to any of the items contained in said itemized statement, the Court finds that said costs were properly taxed and affirms the order of the clerk, and orders that the costs herein up to the date of the judgment be and the same are taxed in the manner previously taxed by the clerk, that is to say, in the amount of \$1,128.17.

Done in open court this 3d day of April, 1918.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. O, page 141.

Copy received.

JNO. RUSTGARD.

Filed in the District Court, District of Alaska, First Division. Apr. 3, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [118]

Department of Justice,
 United States Marshal's Office,
 First Division, District of Alaska.

*In the United States District Court for the District
 of Alaska, Division No. One.*

No. 1669-A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

SCHENK & McDONALD,

Defendants.

Certificate of U. S. Marshal Re Costs.

This is to certify that the plaintiff paid to the United States marshal's office, as costs in the above-entitled case, accruing up to the date of the judgment, without any reference to costs accruing since that date, the sum of ten hundred sixty-six and 17/100 dollars (\$1,066.17), expended in connection with the care and custody of attached property and other marshal's fees, in connection with this cause, prior to the date of the judgment herein, as follows:

Marshal's expenses in serving writ of at-	
tachment	\$ 96.17
Keeper's fees	970.00
	<hr/>
Total	\$1,066.17
	<hr/>

Dated at Juneau, Alaska, April 2, 1918.

For the United States Marshal,
W. W. CASEY, Jr.,
Chief Deputy.

Filed in the District Court, District of Alaska,
First Division. Apr. 2, 1918. J. W. Bell, Clerk.
By _____, Deputy. [119]

Department of Justice.
United States Marshal's Office,
First Division, District of Alaska.

Juneau, Alaska, April 3, 1918.

No. 1669-A.

WORTHEN LUMBER MILLS,
Plaintiff,
vs.
SCHENK & McDONALD,
Defendants.

MARSHAL'S COST BILL.

Juneau to Portage Bay—Attachment—90 miles @ 6¢ (\$5.40)	
Juneau to Petersburg, via Portage Bay— Summons—118 miles @ 6¢ (\$7.08)	
Actual expense taken as fee in lieu of mileage	\$ 25.00
Hire of launch "Qareta"	\$ 25.00
Petersburg to Portage Bay28 miles	
Portage Bay to Petersburg28 miles	
<hr style="width: 10%; margin-left: auto; margin-right: 0;"/>	
56 miles @ 6¢ (\$3.36)	

Actual expense taken as fee in lieu of mileage	25.00
Hire of launch "Lorraine"	
Petersburg to Juneau—2 writs @ 108 miles —216 @ 6¢	12.96
Meals at Petersburg from supper Sept. 7, 1917, to dinner Sept. 13, 1917.....	12.00
Room at Petersburg Sept. 7 to 12, 1917, both incl	6.00
Meals at Petersburg from supper Sept. 14 to dinner Sept. 15, 1917, incls.....	2.05
Room at Petersburg Sept. 14, 1917.....	1.00
Exchange—Check cashed at Bank, Peters- burg .....	.16
Writs served—3 summons @ \$3.00.....	9.00
Attachment served—1 writ.....	3.00
Keeper's fees from Sept. 13 to 30, 1917, incl. 18 @ \$5.00	90.00
Keeper's fees from Oct. 1, 1917, to Oct. 31, 1917, 31 @ \$5.00	155.00
Keeper's fees from Nov. 1, 1917, to Nov. 30, 1917, 30 @ \$5.00.....	150.00
Keeper's fees from Dec. 1 to 31, 1917—31 days @ \$5.00	155.00
Keeper's fees from Jan. 1 to 31, 1918—31 days @ \$5.00	155.00
Keeper's fees from Feb. 1 to 28, 1918—28 days @ \$5.00	140.00
Keeper's fees from Mch. 1 to 25, 1918—25 days @ \$5.00	125.00
Total	<hr/> 1,066.17

United States of America,
District of Alaska,
Division No. One,—ss.

I, J. M. Tanner, United States Marshal for the 1st Division, District of Alaska, do hereby certify that the foregoing statement of costs in the amount of One Thousand Sixty-six and 17/100 Dollars (\$1,066.17), were necessarily incurred by me in [120] the case of Worthen Lumber Mills vs. Schenk & McDonald, Court No. 1669-A, that all the expenses incurred are reasonable and in the amount usually paid for such services, and that I have been fully compensated for same by the plaintiff in the within entitled cause. That the foregoing statement is in full for all costs incurred up to and inclusive of the date of judgment, March 25, 1918, and does not include any costs since the date aforesaid.

(Signed) J. M. TANNER,
United States Marshal.

Filed in the District Court, District of Alaska,
First Division. Apr. 3, 1918. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [121]

*In the District Court for the Territory of Alaska,
Div. No. 1, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD and EDWARD
SCHENK and GORDON D. McDONALD,
as Individuals,

Defendants.

Assignment of Errors.

Come now the above-named defendants and assign the following errors as having been committed by the District Court of Division Number One, District of Alaska, at Juneau, in the proceedings in the above-entitled cause upon which the defendants below, the plaintiffs in error, intend and do rely in prosecuting their writ of error herein:

I.

The Court erred in holding and ruling that the scale of logs made by plaintiff below was binding on both parties to the action and in holding and deciding that it was immaterial what the true scale of the logs involved was.

II.

The Court erred in sustaining plaintiff's objection to the following question put by defendants below

to witness McDonald, to wit: "Did you see the term 'mill scale' used or hear it used before the time it was used in the contracts here?"

III.

The Court erred in sustaining plaintiff's objection to the following question put by defendants below to witness McDonald, to wit: "At the time this contract was signed did you have any talk with Mr. Worthen as to what interpretation was to be placed upon it (the term 'mill scale')?" [122]

IV.

The Court erred in sustaining plaintiff's objection to the question of defendants below put to witness McDonald, to wit: "Mr. McDonald, do you know what is meant by 'mill scale'?"

V.

The Court erred in sustaining plaintiff's objection to the following question by defendants below to witness McDonald, to wit: "Did you have any discussion with Worthen at the time of the signing of this contract what it (the term 'mill scale') meant?"

VI.

The Court erred in sustaining plaintiff's objection to the following question asked by defendants below of witness Allen, to wit: "Counting spruce and hemlock together, what did that (the Duncan Canal raft) scale?"

VII.

The Court erred in sustaining plaintiffs objection to the following question put to witness Allen by defendants below, to wit: "Now, then, what did you

find that raft from Duncan Canal to contain in board measure?"

VIII.

The Court erred in sustaining plaintiff's objection to the following offer of defendants below, to wit: "I offer to prove by this witness that the raft in question contained 516,680 board ft. measure after all bad logs or defective logs or defective parts of logs had been excluded from the count by the ranger."

IX.

The Court erred in sustaining plaintiff's objection to the following question asked of witness Allen by the defendants below, to wit: "I ask you now, Mr. Allen, to state what that raft (No. 1, 1917) contained in board measure excluding 2 feet on all 34 ft. logs which were scaled as such." [123]

X.

The Court erred in sustaining plaintiff's objection to the following offer made by defendants below, to wit: "I offer to prove by this witness that on behalf of the Government as a forest ranger he (James Allen) scaled the ten rafts at Portage Bay before they were delivered to the Worthen Lumber Mills, that they are the same rafts which McDonald has testified that he, McDonald, did at that place deliver to the Worthen Lumber Mills, and that the scale was as follows: 281,960; 268,080; 219,220; 217,280; 230,870; 230,930; 314,970; 273,590; 273,320; 359,860: total, 2,670,080; and that this is the scale after all bad logs, splits, shakes and discounts of 2 feet on each 34 foot log had been eliminated."

XI.

The Court erred in sustaining plaintiff's objection to the following offer of defendants below, to wit: "Before I dismiss this witness, your Honor, I wish to make the offer further to prove by other witnesses that the actual scale made by this witness of these rafts was a correct scale of the actual board feet contained in the rafts."

XII.

The Court erred in sustaining plaintiff's objection to the following offer made by defendants below, to wit: "I offer to prove by this witness (James Allen) that he scaled the rafts which McDonald has testified he delivered to the Worthen Lumber Mills at Portage Bay in May, 1916, at Malmsbury June 26th, or in the spring of 1916 and at Duncan Canal. I offer to prove that the scale of those rafts was as follows, after allowing for all [124] defective logs, splits, etc., the same as the other offer: 148,060; 343,480; 397,770; 516,680; total, 1,405,990."

XIII.

The Court erred in sustaining plaintiff's objection to the following question put by defendants below to witness Weigle, to wit: "What is that meaning (of the term 'mill scale' as used by the Forest Service)?"

XIV.

The Court erred in sustaining plaintiff's objection to the following question asked of witness Weigle by defendants below, to wit: "In that connection I ask you what does the term 'mill scale' import?"

XV.

The Court erred in sustaining plaintiff's objection to the following offer by defendants below, to wit:

“I offer to prove by this witness that the term ‘mill scale’ as used by the Forestry Service as he has testified is as follows: ‘the tally of the lumber after the logs are run through the mill, tally behind the saw.’ ”

XVI.

The Court erred in giving the following instruction to the jury, to wit: “Whether anything was done under it (the contract of March 27, 1916) or not is absolutely immaterial in this case.”

XVII.

The Court erred in instructing the jury as follows, to wit: “I say that has nothing to do with the case now because the bill of particulars shows that whatever logs were delivered under that contract have been fully paid for with the exception of \$74.42.”

XVIII.

The Court erred in sustaining the order and judgment of the Clerk of the Court in taxing as costs marshal’s fees at \$1,066.17 and [125] in taxing any marshal’s fees as costs over and above the sum of \$96.17.

XIX.

The Court erred in entering judgment in favor of plaintiff and against the defendants below.

WHEREFORE defendants below, these plaintiffs in error, pray that the judgment herein entered on the 25th day of March, 1918, be reversed.

JOHN RUSTGARD,
Attorneys for Defendants Below and Plaintiffs in
Error.

Filed in the District Court, District of Alaska,
First Division. Jun. 14, 1918. J. W. Bell, Clerk.
By —————, Deputy. [126]

*In the District Court for the Territory of Alaska,
Div. No. 1, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GORDON
D. McDONALD and EDWARD SCHENK
and GORDON D. McDONALD, as Individ-
uals,

Defendants.

Petition for Writ of Error.

Edward Schenk and Gordon D. McDonald, copart-
ners as Schenk & McDonald, the defendants above
named, feeling aggrieved by the decision and judg-
ment given and rendered herein in favor of plaintiff
and against the defendants, and each of them, on
the 25th day of March, 1918, hereby respectfully pray
the Honorable Court that a writ of error issue from
the United States Circuit Court of Appeals for the
Ninth Circuit to the District Court for the Territory
of Alaska, Division Number One, and that said writ

of error be heard by said Circuit Court of Appeals at Seattle, Washington.

JOHN RUSTGARD,

Attorney for Plaintiffs in Error.

Now, on this 14th day of June, A. D. 1918, it is hereby ORDERED that the writ of error prayed for issue and that the said cause be heard before the United States Circuit Court of Appeals for the Ninth Circuit at Seattle, in the State of Washington, the defendants to give bond in the sum of \$250, conditioned according to law and to be approved by this Court.

Done in open court this 14th day of June, 1918.

ROBERT. W. JENNINGS,

District Judge.

Entered Court Journal No. O, page 219.

Filed in the District Court, District of Alaska, First Division, Jun. 14, 1918. J. W. Bell, Clerk. By _____, Deputy. [127]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 1669-A.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable
the Judge of the District Court of the District of
Alaska, Division Number One, GREETING:

Because in the record and proceedings as also in
the rendition of the judgment of a plea which is in
the said District Court before you between Worthen
Lumbers Mills, a corporation, as plaintiff, and
Schenk & McDonald as defendants, a manifest error
has happened to the great damage of the said de-
fendants Edward E. Schenk and Gordon D. McDon-
ald as is said and appears by their petition herein,
we, being willing the error if any hath been done
should be duly corrected and full and speedy justice
done unto the parties aforesaid in this behalf, do com-
mand you if judgment be therein given that then
under your seal distinctly and openly you send all
the records and proceedings as aforesaid with all
things concerning the same to the Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit in the City of San Francisco, in the
State of California, together with this writ, so as to
have the same at the said place in the court on the
13th day of July, 1918, that the records and proceed-
ings aforesaid may be inspected and said Circuit
Court of Appeals may cause to be done therein to
correct these errors what of right and according to
the law and custom of the United [128] States
should be done.

WITNESS the Honorable EDWARD DOUG-
LASS WHITE, Chief Justice of the Supreme Court

of the United States, this 14th day of June, 1918.

Attest my hand and seal of the District Court of the District of Alaska, First Division, on the day and year last above written.

[Seal]

J. W. BELL,

Clerk of the District Court for Division Number One,
District of Alaska.

Filed in the District Court, District of Alaska,
First Division. Jun. 14, 1918. J. W. Bell, Clerk.
By _____, Deputy. [129]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD and EDWARD
SCHENK and GORDON D. McDONALD, as
Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to
Worthen Lumber Mills, a Corporation, and Hel-
lenthal & Hellenthal, Esqs., Its Attorneys:

You are hereby cited and admonished to be and ap-
pear in the United States Circuit Court of Appeals
for the Ninth Circuit to be held in the City of San

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD and EDWARD
SCHENK and GORDON D. McDONALD, as
Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendants in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Edward Schenk and Gordon D. McDonald,
copartners as Schenk & McDonald, principals, and
B. M. Behrends, as surety, are held and firmly bound
unto Worthen Lumber Mills, a corporation, the
above-named defendant in error, in the sum of \$250
to be paid by the said Schenk & McDonald to the said
Worthen Lumber Mills, a corporation, for the pay-
ment well and truly to be made, we bind ourselves and
each of us, jointly and severally, and our and each of
our heirs and administrators, executors and succes-
sors firmly by these presents. Sealed with our seals
and dated this 14th day of June, 1918.

The condition of this obligation is such that,
whereas the above-named plaintiffs in error and prin-
cipals in this bond have sued out a writ of error to the
United States Circuit Court of Appeals for the
Ninth Circuit to reverse the judgment in the above-
entitled case by the District Court for the District of

Alaska, First Division, entered herein on the 25th day of March, 1918, in favor of the aforementioned defendant in error and against said aforementioned plaintiffs in error.

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Schenk & McDonald shall prosecute said [131] writ of error to effect and answer all costs and damages if they shall make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EDWARD E. SCHENK.

GORDON D. McDONALD.

By JOHN RUSTGARD,

Their Attorney,

Principals.

B. M. BEHRENDTS,

Surety.

United States of America,
Territory of Alaska,—ss.

B. M. Behrends, being first duly sworn, deposes and says that he is the surety above named and as such executed the foregoing bond. That he is a merchant and banker residing at Juneau, Alaska, and is worth at least five hundred dollars over and above his debts and liabilities and property exempt from execution; that he is not a counselor or attorney, marshal, clerk of any court, or other officer of any court.

B. M. BEHRENDTS.

Subscribed and sworn to before me this 14th day of June, 1918.

[Notarial Seal]

JOHN RUSTGARD,

Notary Public.

My commission expires Sept. 14th, 1918.

Approved June 14/18.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,
First Division. Jun. 14, 1918. J. W. Bell, Clerk.
By _____, Deputy. [132]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD and EDWARD
SCHENK and GORDON D. McDONALD, as
Individuals,

Defendants.

Demand for Bill of Particulars.

To the Above-named Plaintiff and Its Attorneys,
Hellenthal and Hellenthal:

The defendants above named respectfully request
that they be furnished a bill of the particular items
entering into the account referred to in plaintiff's
complaint and for which this action is instituted.

JOHN RUSTGARD,
Attorney for Defendants.

True copy of the within received this 10th day of September, 1917, at Juneau, Alaska.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Sep. 24, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [132-A]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff and Defendant in Error,
vs.

SCHENK & McDONALD, a Copartnership Com-
posed of EDWARD SCHENK and GOR-
DON D. McDONALD and EDWARD
SCHENK and GORDON D. McDONALD,
Individuals,
Defendants and Plaintiffs in Error.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please certify and transmit to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the following documents in the above-entitled case, to wit:

1. Complaint.
2. Answer.
3. Reply.
- 3½ Demand for bill of particulars.

4. Bill of particulars.
5. Bill of exceptions.
6. Verdict.
7. Judgment.
8. Bill of costs.
9. Objections to costs.
10. Clerk's order taxing costs.
11. Notice of appeal from clerk's order taxing costs.
12. Court order affirming taxation of costs.
13. All certificates of costs and expenses by U. S. Marshal.
14. Assignments of error.
15. Petition for writ of error.
16. Order granting writ of error.
17. Writ of error.
18. Original of citation.
19. Bond on appeal.
20. Court's approval of bond on appeal.

Respectfully,

JOHN RUSTGARD,

Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jun. 25, 1918. J. W. Bell, Clerk. By L. E. Spray, Deputy. [133]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 135 pages of typewritten matter, numbered from one to 133, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per praecipe, of the plaintiffs in error, on file herein and made a part hereof, in the cause wherein Schenk & McDonald, a copartnership composed of Edward Schenk and Gordon D. McDonald, and Edward Schenk and Gordon D. McDonald, as individuals, are plaintiffs in error, and Worthen Lumber Mills, a corporation, is defendant in error, No. 1669-A, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Sixty and 75/100 Dollars (\$60.75), has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand

and the seal of the above-entitled court this 1st day of July, 1918.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 3179. United States Circuit Court of Appeals for the Ninth Circuit. Schenk & McDonald, a Copartnership Composed of Edward Schenk and Gordon D. McDonald, and Edward Schenk and Gordon D. McDonald, as Individuals, Plaintiffs in Error, vs. Worthen Lumber Mills, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed July 8, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full, true and correct copy of the original answers to questions propounded to jury in cause No. 1669-A, entitled *Worthen Lumber Mills*, a corporation, plaintiff, vs. *Schenk & McDonald*, a copartnership composed of *Edward Schenk* and *Gordon D. McDonald*, and *Edward Schenk* and *Gordon D. McDonald* as individuals, defendants; on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said court at Juneau, Alaska, this 31st day of August, 1918.

[Seal]

J. W. BELL,
Clerk.

By L. E. Spray,
Deputy.

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1669-A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD as Individuals,
Defendants.

Answers to Questions Propounded to Jury.**SPECIAL FINDING OF FACTS.**

Question No. 1.—What sum, if any, do you find should be allowed to the credit of defendants for and on account of the use of the towboat and crew mentioned in the second counterclaim set up by defendants in the answer?

Answer.—795.00 (seven hundred and ninety-five dollars).

Question No. 2.—What sum, if any, do you find should be allowed to the credit of defendants for and on account of the boom chains and piling chains mentioned in the fourth counterclaim set up by defendants in the answer?

Answer.—Two hundred and thirty-eight dollars fifty cents (\$238.50).

Question No. 3.—What sum, if any, do you find should be allowed to credit of defendants for the six workmen mentioned in the fifth counterclaim set up by defendants in the answer?

Answer.—Twenty-seven dollars (\$27.00).

JOHN McLOUGHLIN,

Foreman.

Entered Court Journal No. O, page 98.

Filed in the District Court, District of Alaska, First Division. Mar. 18, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No. 3179. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of Answers to Questions Propounded to Jury. Filed Sep. 10, 1918. F. D. Monckton, Clerk.